

Reforming UK Surrogacy Law: Bridging the Gap Between Regulation and Practice

Thesis submitted in accordance with the requirements of the University of Liverpool
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By

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Abstract

Reforming UK Surrogacy Law: Bridging the Gap Between Regulation and Practice

Emma Walmsley

The law regulating surrogacy in the UK is outdated, piecemeal and increasingly unfit for purpose. The Surrogacy Arrangements Act 1985 (SA Act 1985), which prohibits commercial surrogacy in the UK, was enacted at a time of great hostility towards surrogacy and other forms of Artificial Reproductive Technologies (ARTs). In recent years the practice of surrogacy ‘has been accepted as a method of enabling childless couples to experience the joy and fulfilment of parenthood.’¹ Despite the growing acceptance of surrogacy, regulation – including the Human Fertilisation and Embryology Act 2008 – makes it difficult for intended parents to apply for a parental order following surrogacy. A parental order, which confers joint and equal legal parenthood and parental responsibility upon both intended parents, ‘ensures the child’s security and identity as lifelong members of the intended parent’s family’.² The legislation entrenches the two-parent nuclear ‘ideal’ by only allowing couples, one of whom must have contributed their gametes to create the child, to apply for a parental order. As such, a plethora of ‘less conventional’ families are prohibited from applying for a parental order, including single parents, non-genetic parents and platonic co-parents.

In addition to the narrow view of parenthood adopted by UK regulation, the ban on payments, the unenforceability of contracts, and the prohibition on advertising has resulted in a shortage of surrogates. Some intended parents have resorted to the ‘dangerous and murky waters of the internet’³ and entered into high risk ‘do-it-yourself’ arrangements which have led to legal complications and the exploitation of vulnerable women. Other intended parents have ventured overseas and entered

¹ *CW v NT and Another* [2011] EWHC 33 (Fam). [1] (Baker J).

² *J v G* [2013] EWHC 1432 (Fam), para [27] (Theis J).

³ *CW v NT*, *op cit*, n1.

international commercial surrogacy arrangements. Such arrangements result in conflict of laws and children being left ‘marooned stateless and parentless’.⁴ It is clear that surrogacy operates in a different context to the one that existed at the time of the SA Act 1985, and urgent reform is required to bridge the gap between regulation and practice. The declaration of incompatibility issued by the High Court between section 54 (1) HFEA 2008 and Articles 8 and 14 of the European Convention on Human Rights presents an opportunity to revisit the surrogacy landscape.⁵ This thesis uses a combination of doctrinal analysis and empirical work to identify the reforms that are necessary to protect the procreative liberty of intended parents and the rights of the resulting child; two concerns which have been strikingly absent from the law regulating this area.

⁴ *X and Y (Foreign Surrogacy)* [2008] EWCH 3030. [10] (Hedley J).

⁵ *Re Z (A Child) (No. 2)* [2016] EWCH 1191 (Fam).

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Emma Walmsley, Liverpool, October 2018.

Preface

The empirical work referred to throughout this thesis was carried out in 2016.

The law is stated up to 9th October 2018.

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Titles of Appendices

Appendix One

Evidence of ethical approval

Appendix Two

Participant consent form (template)

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Participant information sheet

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Sample of interview questions

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Table of pseudonyms and interview codes

List of Cases

A.A. v. B.B., (2007) 83 O.R. (3d) 561 (C.A.).

A and B (No 2 - Parental Order) [2015] EWHC 2080 (Fam).

AB and Another v Minister of Social Development [2016] ZACC 43.

AB v CD (Surrogacy - Time Limit and Consent) [2015] EWFC 12.

AB v DE [2013] EWHC 2413 (Fam).

AB v Minister of Social Development As Amicus Curiae: Centre for Child Law (40658/13) [2015] ZAGPPHC 580; 2016 2 SA 27.

A v C [1985] FLR 445.

A v P (Surrogacy: Parental order: Death of Applicant) [2011] EWHC 1738 (Fam).

Berrehab and Koster v The Netherlands (1989) 11 EHRR 322.

C and C v S 1996 S.L.T. 1387; [1996] 6 WLUK 303 (IH (1 Div)).

Canada (Attorney General) v Mossop [1993] 1 SCR 554.

CC v DD [2014] EWHC 1307 (Fam).

CG v CW & G (Children) [2006] EWCA Civ 372.

CW v NT and another [2011] EWHC 33 (Fam).

Dickson v UK, [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007).

E.B. v. France, ECHR 43546/02. ECHR (Grand Chamber. 22 January 2008).

Evans v UK, app no 6339/05 (ECtHR, 10 April 2007).

Fredin (No1) v Sweden A192 (1991);13 EHRR 784.

Gaskin v. United Kingdom (Access to Personal Files), 7 July 1989, 12 EHRR.

Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 55.

Gillick v West Norfolk and Wisbech Area Health Authority [1986] 1 AC 112.

H v S (Surrogacy Agreement) [2015] EWFC 36.

In re G (Adoption: Unmarried Couple) [2008] UKHL 38.

In the matter of X and Y (Children) And in the matter of Section 54 of the Human Fertilisation and Embryology Act 2008 [2011] EWHC 3147 (Fam).

In the matter of Z (A Child) (No 2) [2016] EWHC 1191 (Fam).

In the Matter of D and L (Minors) (Surrogacy) And in The Matter of Human Fertilisation And Embryology Act 2008 [2012] EWHC 2631.

Inze v Austria, ECHR, Judgement 28 October 1987, Series A, 126.

J and Another v C and Others [1969] 1 All ER 788.

J v G [2013] EWHC 1432 (Fam).

Johnson v Calvert 851 P 2d 776, (1993) (Supreme Court of California).

Johnston and Others v Ireland (Application no. 9697/82).

JP v LP & Others [2014] EWHC 595 (Fam).

Keegan v Ireland, 18 EHRR 342 1994.

Khan v UK (2010) 50 EHRR 47.

Kjeldsen, Busk Madsen and Pedersen v Denmark A 23 (1976); 1 EHRR 711.

Kopf and Liberda v. Austria, 1598/06, 17 January 2012.

Kroon v The Netherlands (1994) 19 EHRR 263.

Labassee v France, 26 June 2014, (Application no. 65941/11) ECtHR.

Marckx v Belgium (1979) 2 EHRR 330.

Mennesson v France (Application no. 65192/11) European Court of Human Rights, 26 June 2014.

M v F & SM (Human Fertilisation and Embryology Act 2008) [2017] EWHC 2176 (Fam).

Mikulic v. Croatia (App. No. 53176/99), ECtHR, February 2002.

Moretti and Benedetti v. Italy (App. No. 16318/07) ECtHR, 27 April 2010.

Nazarenko v. Russia, (App. No. 39438/13), ECtHR 2015.

Paradiso and Campanelli App no. 25358/12 (ECtHR, 2nd Section, 27th January 2015).

Paradiso and Campanelli v Italy App no. 25358/12 (ECtHR, Grand Chamber 24 January 2017).

R (on the application of Rose and another) v Secretary of State for Health and another [2002] EWHC 1593 (Administrative Court).

R and S v T (Surrogacy: Service, Consent and Payments) [2015] EWFC 22

Re A (Foreign Surrogacy - Parental Responsibility) [2016] EWFC 70.

Re A and B (Surrogacy: Domicile) [2013] EWHC 426 (Fam).

Re B v C (Surrogacy: Adoption) [2015] EWFC 17.

Re C (Application by Mr. and Mrs. X under Section 30 of the Human Fertilisation and Embryology Act 1990) [2002] 1FLR 909.

Re C (A Child) [2013] EWHC 2408 (Fam).

Re C (A Minor) (Wardship: Surrogacy) [1985] FLR 846.

Re DM and LK [2016] EWHC 270 (Fam).

Re F and M (Children) (Thai Surrogacy) (Enduring Family Relationship) [2016] EWHC 1594 (Fam).

Re G [2006] EWCA Civ 372.

Re G [2006] UKHL 43.

Re G (Surrogacy: Foreign Domicile) [2007] EWHC 2814 (Fam).

Re G and M [2014] EWHC 1561 (Fam).

Re: IJ (A Child) [2011] EWHC 921 (Fam).

Re L (A Minor) [2010] EWHC 3146 (Fam).

Re P [2008] UKHL 38.

Re: PM (Parental Order: Payments) [2013] EWHC 2328 (Fam).

Re R (A Minor) (Wardship: Consent to Medical Treatment) [1991] 4 All ER 177.

Re S (Parental Order) [2009] EWHC 2977.

Re W (A Minor) (Medical Treatment) [1992] 4 All ER 627.

Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam).

Re X and Y (Parental Order: Retrospective Authorisation of Payments) [2011] EWHC 3147 (Fam).

Re Z (A Child: Human Fertilisation and Embryology Act: parental order) [2015] EWFC 73.

Re Z (surrogacy agreements) (Child arrangement orders) [2016] EWFC 34.

SH v Austria (Application no 57813/00) Grand Chamber 3rd November 2011.

Wagner and J.M.W.L. v. Luxembourg, (App. No. 76240/01), ECtHR, 28 June 2007.

WT [2014] EWHC 1303 (Fam).

X (A Child - foreign surrogacy) [2018] EWFC 15.

X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

X. Y. & Z. v. United Kingdom Reports 1997-II no. 35, (1997) 24 E.H.R.R. 143.

List of Legislative Instruments

United Kingdom

Adoption Act 1926

Adoption Act 1976

Adoption Act 2002

Adoption and Children Act 2002

Children Act 1989

Children Act 2004

Civil Partnerships Act 2004

Equality Act 2010

Human Fertilisation and Embryology (Parental Order) Regulations 2010

Human Fertilisation and Embryology Act 1990

Human Fertilisation and Embryology Act 2008

Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004

Human Fertilisation and Embryology Bill (2008)

Human Rights Act

Parental Orders (Human Fertilisation and Embryology) Regulations 1994, (SI No 2767).

Surrogacy Arrangements Act 1985

United Nations Convention on the Rights of the Child

France

French Civil Code

Pakistan

The Guardian and Wards Act 1890.

Russia

The Family Code Of Russia 1995.

Ukraine

Family Code of Ukraine 2002

Treaties

European Convention on Human Rights

United Nations Convention on the Rights of the Child

Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of
Intercountry Adoption.

List of Abbreviations

AID	Artificial Insemination by Donor
ARTS	Assisted Reproductive Technologies
BB	Brilliant Beginnings
Cafcass	Children and Family Court Advisory and Support Service
COTS	Childlessness Overcome Through Surrogacy
CRC	United Nations Convention on the Rights of the Child
ECtHR	European Court of Human Rights
HFEA 1990	Human Fertilisation and Embryology Act 1990
HFEA 2008	Human Fertilisation and Embryology Act 2008
HFE Authority	Human Fertilisation and Embryology Authority
HRA 1998	Human Rights Act 1998
IVF	In Vitro Fertilisation

PO	Parental Order
SA Act 1985	Surrogacy Arrangements Act 1985
SUK	Surrogacy UK

Chapter One

1. Introduction

The law governing surrogacy in the UK has ‘developed in a haphazard fashion and piecemeal changes made over the years have resulted in a regulatory framework that is contradictory and confusing for all involved’.¹ In January 1985, there was public outcry when married mother of two, Kim Cotton, received £6500 for acting as a surrogate.² After local authority intervention the intended parents, who were from the US, were granted wardship by the courts. Delivering the judgment, Latey J referred to the ‘difficult and delicate problems of ethics, morality and social desirability raised by surrogacy’.³ This provided impetus for the Surrogacy Arrangements Act 1985 (SA Act 1985), which Freeman describes as ‘an ill-considered and largely irrelevant panic measure, which in essence criminalised commercial surrogacy’.⁴ The provisions of the SA Act 1985 were heavily influenced by the recommendations of the *Report of the Committee of Inquiry into Human Fertilisation and Embryology*,⁵ which was set up to consider the ‘social, ethical and legal implications of recent and potential developments in human fertilisation and embryology’.⁶ The *Warnock Committee* was unanimous that surrogacy for convenience alone was ‘totally ethically unacceptable’⁷ but the majority went even further and held that:

¹ A Alghrani and D Griffiths, ‘The regulation of surrogacy in the United Kingdom: the case for reform’, [2017] *Child and Family Law Quarterly*, 165, p166.

² *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846. Hereafter ‘*Baby Cotton*’. See also, BBC News, ‘Inquiry over ‘baby-for-cash deal’, <http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm> (last accessed 17/07/18).

³ *Ibid.*

⁴ M Freeman, ‘Is Surrogacy Exploitative?’ in S McLean (ed), *Legal Issues in Human Reproduction* (Dartmouth, 1989), at p 165.

⁵ M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter ‘*Warnock Report*’.

⁶ *Ibid.*, 1.1.

⁷ *Ibid.*, 8.17.

‘Even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case...’⁸

The majority recommended that legislation be introduced to criminalise the creation or the operation in the UK of both profit and non-profit agencies but stopped short of suggesting criminalising private individuals entering surrogacy arrangements; it did not want ‘...children being born to mothers subject to the taint of criminality’.⁹ The *Warnock Report* also recommended that surrogacy agreements should be deemed ‘illegal contracts and therefore unenforceable in the courts’.¹⁰ The Committee clearly influenced the restrictive stance of the SA Act 1985 which prohibits commercial involvement in the initiation and negotiation of surrogacy agreements,¹¹ makes the publication or distribution of adverts indicating a willingness to take part in surrogacy (or seeking a surrogate) a criminal offence¹² and makes surrogacy arrangements unenforceable.¹³ Despite the significant social, technological and legal changes that have occurred over the last three decades, the SA Act 1985 remains the primary legislation governing surrogacy in the UK.

In 1997 another Committee, chaired by Brazier, was established to review UK surrogacy law.¹⁴ It found that the incomplete implementation of the recommendations of the *Warnock Committee* had ‘created a policy vacuum within which surrogacy has developed in a haphazard fashion’.¹⁵ The *Brazier Review* considered three main areas: (1) whether surrogates should be allowed payment; (2) whether an agency should be established to regulate surrogacy arrangements; and (3) whether the findings on these issues suggest that existing legislation needs to be changed.¹⁶ These issues, which are

⁸ *Ibid.*

⁹ *Ibid.*, 8.17-8.18.

¹⁰ *Ibid.*, 8.19.

¹¹ Section 1A SA Act 1985.

¹² Section 3 SA Act 1985.

¹³ Section 2 SA Act 1985.

¹⁴ *Review for Health Ministers of Current Arrangements for Payments and Regulation* Cm 4068 (1998), Margaret Brazier, Alastair Campbell and Susan Golombok. Hereafter ‘*Brazier Review*’.

¹⁵ *Ibid.*, 3.

¹⁶ *Ibid.*, 1.2.

yet to be resolved, are revisited in this thesis. The next legal development was the Human Fertilisation and Embryology Act 1990 (HFEA 1990) which was updated in 2008. For the purposes of surrogacy, the HFEA 2008 sets out: (1) certain requirements that intended parents must satisfy to apply for a parental order following surrogacy¹⁷ and (2) provisions explaining who the child's legal parents are.¹⁸ The HFEA 2008 did not make any substantive changes to the earlier provisions regulating surrogacy in the 1990 Act, except to extend parental orders to same-sex couples. The next piecemeal change was the introduction of the Human Fertilisation and Embryology (Parental Orders) Regulations 2010,¹⁹ which applied section 1 of the Adoption and Children Act 2002 (ACA 2002) to parental order applications. This means the child's welfare must now be the court's 'paramount consideration...throughout his lifetime'. These piecemeal changes have led to a patchwork of regulation with contradictory policies. The SA Act 1985 prohibits commercialisation, yet the Parental Order Regulations 2010 effectively require the judiciary to award a parental order where payments exceed reasonable expenses.²⁰

1.1 Is UK Surrogacy Regulation in Need of Reform?

Since the inception of the SA Act 1985, attitudes towards surrogacy have transformed. Celebrities including Sir Elton John,²¹ Kim Kardashian,²² and, most recently, Olympic

¹⁷ Section 54 HFEA 2008. A parental order confers joint and equal legal parenthood and parental responsibility upon both intended parents and fully extinguishes the parental status of the surrogate under English law. This ensures the child's security and identity as lifelong members of the intended parent's family. See *J v G* [2013] EWHC 1432 (Fam), [27] (Theis J).

¹⁸ Sections 33-48 HFEA 2008.

¹⁹ No. 985. Hereafter, 'Parental Order Regulations 2010'.

²⁰ See for example, *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [26] (Hedley J). Hereafter '*X & Y*'.

²¹ BBC News, 28th December 2010, 'Sir Elton John becomes father via surrogate', <<https://www.bbc.co.uk/news/entertainment-arts-12084650>> (last accessed 16/07/18).

²² The Guardian, 16th January 2018, 'Kim Kardashian and Kanye West announce birth of third child', <<https://www.theguardian.com/music/2018/jan/16/kanye-west-and-kim-kardashian-announce-birth-of-third-child>> (last accessed 16/07/18).

swimmer Tom Daley,²³ have normalised surrogacy as a method to have children. It is not just celebrities who use surrogacy; in 2015, a supermarket worker, Kyle Casson, became a single father after his 46-year-old mother Anne offered to be a surrogate.²⁴ Kyle was awarded an adoption order by the courts, rather than the more appropriate parental order, because single people are not allowed to apply for a parental order under the HFEA 2008.²⁵ The acceptability of surrogacy as an avenue to parenthood is evident in the number of children born as a result of the practice. In 2016, Childlessness Overcome Through Surrogacy (COTS), which is a non-profit surrogacy organisation set up by former surrogate, Kim Cotton, celebrated its 1000th surrogate birth since it opened in 1988.²⁶ In 2012, Crawshaw *et al.*, identified an average of fewer than 50 parental orders being granted per year up to 2007 in the UK. This rose to 75 in 2008, 79 in 2009, 83 in 2010, and 149 in 2011.²⁷ This shows a sharp increase in the number of parental orders being applied for since 2007, which could indicate surrogacy is being used more widely.²⁸ Ultimately, surrogacy has become a routine method of family making. In *CW v NT and another*²⁹ Baker J stated that, ‘in recent years the practice of surrogacy – whereby a woman gives birth to a child for others - has been accepted as a method of enabling childless couples to experience the joy and

²³ The Guardian, 30th June 2018, ‘Tom Daley and Dustin Lance Black announce birth of their son’ <<https://www.theguardian.com/sport/2018/jun/30/tom-daley-dustin-lance-black-son-robert-ray>> (last accessed 16/07/18).

²⁴ BioEdge, 7th March 2015, ‘British mum becomes surrogate for son’s baby’, https://www.bioedge.org/bioethics/british_mum_becomes_surrogate_for_sons_baby/11356

²⁵ *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17 (13 February 2015).

²⁶ Childlessness Overcome Through Surrogacy website, <https://www.surrogacy.org.uk/> (last accessed 17/07/18).

²⁷ M Crawshaw, E Blyth and O Akker, ‘The changing profile of surrogacy in the UK – Implications for national and international policy and practice’ (2012) 34(3) *Journal of Social Welfare and Family Law* 265, p269.

²⁸ The number of people having children through surrogacy could be higher than these figures indicate, because it is not a mandatory requirement to apply for a parental order in the UK. The data only captures families who have applied for a parental order.

²⁹ [2011] EWHC 33 (Fam).

fulfilment of parenthood.’³⁰ This stands in sharp contrast to Latey J’s hostility towards surrogacy in *Baby Cotton*.³¹

Despite the growing acceptability of this method of family-formation, single people, co-parents, multiple parents and doubly-infertile³² individuals are unable to apply for a parental order following surrogacy. Prohibitive regulation in the UK, including the ban on payments to surrogates, has led to a shortage of surrogates.³³ This has driven UK intended parents into high-risk ‘do-it-yourself’ (DIY) arrangements, which are routinely facilitated through the ‘dangerous and murky waters of the internet’.³⁴ Other intended parents venture overseas to jurisdictions where surrogacy regulation is more liberal, but encounter a plethora of practical and legal complications after choosing this route.³⁵ Therefore, UK regulation fails to protect the rights of the intended parents using surrogacy, and the rights of the children involved. It is suggested that two policies, underpinning current regulation, are responsible for this: (1) the promotion of the ‘sexual’ family;³⁶ and (2) the prohibition on commercial surrogacy. This thesis critiques these policies and asks the following research questions:

- 1) How fit for purpose is the current patchwork of regulation currently governing surrogacy?
- 2) Does the legislation’s preference towards the sexual family affect the procreative rights of the intended parents and the rights of the child?
- 3) How does the ban on commercial surrogacy affect procreative rights and the rights of the child?

³⁰ *Ibid*, [1].

³¹ *Op cit*, n2.

³² Double-infertility occurs when an individual is both unable to carry a pregnancy to term (gestate) and use their gametes.

³³ ‘Childless UK Couples Forced Abroad to Find Surrogates’, The Guardian, 20th February 2016, <<https://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogates>> (last accessed 16/09/18).

³⁴ *Op cit*, n29, [38] (Baker J).

³⁵ See for example *X & Y*, *op cit*, n20.

³⁶ M Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge: New York and London, 1995) 143. Fineman defines the ‘sexual family’ as one consisting of a married heterosexual couple and their genetically related offspring. See also, J McCandless and S Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’, (2010) 73(2) *Modern Law Review*, 175-207.

- 4) How has the judiciary (for England and Wales) and the European Court of Human Rights (ECtHR) treated the rights of the child and the intended parents' procreative liberty?
- 5) Which reforms are necessary to centralise procreative liberty and children's rights in UK surrogacy legislation?

In answering these questions, this thesis' principal objective is to address what legal reforms are needed to protect the procreative rights of those using surrogacy, and the rights of the resulting child. In doing so, the thesis uses a combination of theoretical approaches, doctrinal analysis and small-scale empirical work.

(I) Procreative Liberty

The theme of 'procreative liberty' is used throughout this research to critique the current law and suggest reforms that can better respect the choices of those using surrogacy in the UK. Procreative liberty is defined by Professor John Robertson in *Children of Choice*³⁷ as the right to reproduce and the converse right not to.³⁸ In later work, he explains that the liberty to avoid having offspring and the liberty to have offspring, are different rights, which are 'connected by their common concern with reproduction'.³⁹ According to his theory, the liberty to have offspring applies equally to methods of 'non-coital' reproduction, including surrogacy. Although his theory has limitations,⁴⁰ it provides a useful starting point to explore the meaning and value of procreative rights. For Robertson, procreative liberty is valuable and should have legal status:

'...If desired and frustrated, one loses the "defence 'gainst Time's scythe" that "increase" or replication of one's haploid genome provides, as well as the physical and social experiences of gestation, childrearing, and parenting of one's offspring.

³⁷ J. A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, 291pp, Princeton University Press (1996).

³⁸ *Ibid.*

³⁹ J. A. Robertson, 'Procreative Liberty in the Era of Genomics', *American Journal of Law & Medicine*, 29 (2003): 439-87, p447.

⁴⁰ See Gilbert Meilaender, 'Products of the Will: Robertson's Children of Choice', 52 *Washington and Lee Law Review* 173, 173 (1995); and Laura M. Purdy, 'Children of Choice: Whose Children? At What Cost?', 52 *Washington and Lee Law Review* 197, 205 (1995).

Those activities are highly valued because of their connection with reproduction and its role in human flourishing.’⁴¹

For Robertson, the ability to procreate genetically related offspring, experience gestation and parent one’s child, are activities that should have presumptive primacy.⁴² Being deprived of the ability to make these reproductive choices, according to his theory, prevents prospective parents of ‘an experience that is central to individual identity and meaning in life’.⁴³ This thesis reflects upon whether current regulation adequately assists intended parents using, or seeking to use, surrogacy. As Robertson acknowledges, whilst ‘procreative liberty’ ‘denotes freedom in activities and choices related to procreation...the term does not tell us which activities fall within its scope’.⁴⁴ This thesis aims to carve out a more precise understanding of the activities that should fall within the realm of ‘procreative liberty’ in the surrogacy context. Some of the questions asked throughout this thesis include, whether single people should be able to use surrogacy and apply for a parental order; whether parents without a genetic connection to the future child should be able to apply for a parental order; and whether UK regulation restricts the procreative liberty of intended parents by pushing them into DIY and international commercial surrogacy arrangements. Such questions will be answered with reference to doctrinal analysis of domestic and Strasbourg jurisprudence and the author’s empirical work, which consists of interviews with surrogates and intended parents.⁴⁵

Although Robertson’s own understanding of the activities that fall within the scope of procreative liberty is currently too narrow,⁴⁶ his categories are useful for initiating a discussion of procreative rights and surrogacy. He categorises the right to procreate

⁴¹ J. A. Robertson, *op cit*, n39, p454.

⁴² *Children of Choice, op cit*, n37, pp 24-25.

⁴³ *Ibid.*

⁴⁴ J. A. Robertson, ‘Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction’, 59 *South California Law Review*, 939 (1986). P955.

⁴⁵ See Appendices.

⁴⁶ Robertson’s procreative liberty framework only applies to genetic reproduction. For criticism see A Alghrani ‘Uterus transplantation in and beyond cisgender women: revisiting procreative liberty in light of emerging reproductive technologies’, *Journal of Law and the Biosciences*, lsy012, <https://doi.org/10.1093/jlb/lsy012>.

into two groups: (1) the right to procreate genetically (e.g. access ARTs) and, (2) the right to rear and parent one's genetic offspring. These theoretical rights have found some traction in the ECtHR's development of Articles 8 and 14 of the Convention and it is questioned how these rights have been developed by the ECtHR in the specific context of surrogacy.

(II) The Centralisation of Children's Rights in the Surrogacy Context

UK surrogacy regulation makes very little provision for the welfare or rights of the children involved. The SA Act 1985 predates both the Children Act 1989 and United Nations Convention on the Rights of the Child 1991 (CRC). The Parental Order Regulations 1994⁴⁷ made the child's welfare the court's 'first consideration', but following the 2010 Regulations, which imported section 1 of the ACA 2002 into section 54 HFEA 2008:

'Welfare is no longer merely the court's first consideration but becomes its paramount consideration...it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.'⁴⁸

This late addition has rendered many of the provisions in section 54 HFEA 2008 unworkable, including the single parent exclusion, the genetic requirement, and the prohibition on commercial surrogacy. A children's 'rights-based' approach, incorporating the CRC and ECHR, is used in this thesis as a lens to analyse: (1) how current surrogacy regulation, and its underlying policies affect children's rights;⁴⁹ (2) whether the judiciary has interpreted the law in a manner consistent with children's rights; and (3) the reforms that are needed to centralise the rights of the child in this context.

⁴⁷ Parental Orders (Human Fertilisation and Embryology) Regulations 1994, (SI No 2767), sch 1(1)(a).

⁴⁸ *Re L (A Minor)* [2010] EWHC 3146 (Fam), [10] (Hedley J).

⁴⁹ Within the CRC and ECHR.

As Tobin notes there is a ‘growing trend towards calls for the adoption of a rights-based approach.’⁵⁰ According to UNICEF:

‘A child rights-based approach is grounded in the United Nations Convention on the Rights of the Child (UNCRC), a set of internationally agreed legal standards which lay out a vision of childhood underpinned by dignity, equality, safety and participation. Taking a child rights-based approach means using the Convention as a practical framework for working with and for children and young people.’⁵¹

Ultimately, it is a ‘framework that can be used by planners, decision-makers and frontline professionals in both statutory and voluntary agencies’.⁵² The approach, which aims to put rights into practice, is ‘guided by a set of seven mutually-reinforcing principles’⁵³ including: dignity, best interests of the child, non-discrimination, life, survival and development, participation, interdependence and indivisibility and transparency and accountability.⁵⁴ The adoption of a rights-based approach is important because, as Hollingsworth and Stalford submit:

‘It can help to increase the visibility of children within the law by ensuring that their status as rights-holders is recognised, that their voices are heard and that their interests are identified and factored into judicial decision-making.’⁵⁵

Five indicators of a children’s rights-based approach,⁵⁶ identified by Stalford and Hollingsworth, are used in this thesis to see how visible children’s rights are in the surrogacy context. The authors use these primary characteristics to assess case law, but this thesis extends this analysis to assess the case law *and* legislation. First, it is

⁵⁰ J Tobin, ‘Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children’s Health Needs’, 14 *International Journal of Children’s Rights*, 275-306 (2006), p276.

⁵¹ Child Rights Partners Putting Children’s Rights at the Heart Of Public Services, <https://www.unicef.org.uk/child-rights-partners/wp-content/uploads/sites/3/2016/11/Unicef-UK_CRP-information-booklet_14.11.16.pdf> (last accessed 08/10/18).

⁵² See ‘A Child Rights-Based Approach: Seven Principles Grounded in the UN Convention on the Rights of the Child’, < <https://www.unicef.org.uk/child-friendly-cities/child-rights-based-approach/> > (last accessed 17/07/18).

⁵³ *Op cit*, n50.

⁵⁴ *Ibid*.

⁵⁵ K Hollingsworth and H Stalford, ‘Towards Children’s Rights Judgments’, chapter 3, in *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice*, edited by H Stalford, K Hollingsworth and S Gilmore, 2017 (Hart Publishing, 1st ed). P53.

⁵⁶ *Ibid*. These indicators overlap with Tobin’s ‘substantive’ children’s rights approach.

considered whether UK legislation and the judiciary ‘explicitly adopt a child-rights approach by drawing on and utilising to maximum effect the formal legal tools which give effect to children’s rights, including (but not confined to) the CRC’.⁵⁷ Second, this thesis will ask whether surrogacy regulation (and the judiciary) has drawn ‘on scholarly insights to address theoretical tensions, conceptual challenges and prevailing presumptions which stymie the resolution of cases in ways which best protect children’s rights’.⁵⁸ It will also be asked whether the legal processes relating to surrogacy, for example the parental order process, ‘maximise children’s participation by endorsing and conforming with, where possible, child-friendly procedures’.⁵⁹ It will be considered whether the narrative used in the legislation and cases relating to surrogacy ‘centralise the child’s perspective and voice’.⁶⁰ Finally, it will be asked whether surrogacy-conceived children have been ‘acknowledged as one of the audiences’ for legal judgments and surrogacy regulation, ‘through the use of child-appropriate language, structure and style’.⁶¹ These indicators of a child rights-based approach are also used to develop reforms in this area.

Another child rights-based approach that can help increase the visibility of surrogacy-conceived children is Tobin’s ‘substantive children’s rights model’.⁶² He identifies a spectrum of children’s rights approaches, starting with those which engage least with children’s rights, to those which engage with children’s rights in a more rigorous way. The spectrum consists of ‘invisible’, ‘incidental’, ‘selective’, ‘rhetorical’, ‘superficial’ and ‘substantive’ approaches to children’s rights.⁶³ Under an ‘invisible’ approach, the judiciary or legislature fails to identify the relevance of children’s rights to any aspect of the proceedings.⁶⁴ With an incidental approach, children’s rights are relevant but are not essential to ‘either the conceptualisation or resolution of the issues before a

⁵⁷ *Ibid*, p53.

⁵⁸ *Ibid*, p54.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid*.

⁶² J Tobin, ‘Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?’ (2009) 33 *Melbourne University Law Review* 579.

⁶³ *Ibid*, p593.

⁶⁴ *Ibid*, p594.

court...they are merely incidental — a marginal feature of the judicial process that exists on the periphery.’⁶⁵ The issue is ‘reduced to the need to reconcile the tension between the rights of the parents and the obligation of the state’.⁶⁶ A selective approach occurs when a court makes ‘significant rather than incidental references to children’s rights to inform or defend its resolution of the issues’.⁶⁷ However, the analysis is ‘not grounded in a comprehensive and internally coherent application of a rights based approach’.⁶⁸ For example the judiciary or legislation may focus on one right to the exclusion of others. Under a rhetorical approach, children are told that their autonomy will be respected when in truth a welfare approach model is adopted.⁶⁹ This has arisen in the context of medical decision making, where the courts have regularly held children to be competent in the context of access to contraceptive advice⁷⁰ but denied their competency when they refuse life-saving treatment.⁷¹

The superficial approach arises when the judiciary identify the central relevance of children’s rights but fail to ‘consider the actual scope and nature of the rights in question and/or fail to undertake a rigorous assessment as to the manner in which these rights must be balanced against any competing considerations.’⁷² With this approach, children’s rights are used as a trump card to divert ‘the court’s attention from the need to undertake a careful examination of the available evidence and a rigorous balancing of the competing interests.’⁷³ The optimum ‘substantive’ rights-based approach is based on the CRC, and consists of several core principles: (1) A recognition that children have rights, (2) a recognition of the supportive role of a family and the evolving capacity of a child, (3) a requirement to consider children’s rights in all

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, p596.

⁶⁷ *Ibid.*, p597.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ See for example, *Gillick v West Norfolk and Wisbech Area Health Authority* (‘*Gillick*’) [1986] 1 AC 112.

⁷¹ See for example, *Re R (A Minor) (Wardship: Consent to Medical Treatment)* [1991] 4 All ER 177, CA and *Re W (A Minor) (Medical Treatment)* [1992] 4 All ER 627 CA.

⁷² J Tobin, *op cit*, n62, p602.

⁷³ *Ibid.*, p603.

matters concerning them, (4) a requirement to ensure the best interests of children are, as a minimum, a primary consideration in all matters concerning them, and (5) a requirement to avoid a subjective and speculative assessment of a child's best interests and to ensure appropriate consideration is given to the views of a child.⁷⁴ Like Hollingsworth and Stalford, Tobin uses this spectrum to assess whether judicial decision-making adopts a rights-based approach. This thesis uses the spectrum of approaches to assess how the judiciary (both domestic and the ECtHR) have responded to the issue of surrogacy and whether the legislation itself adopts a child rights-based approach.

Although the CRC is not directly incorporated into UK domestic law, 'that is to say, an individual cannot go to a UK court to complain about a breach of any of rights in the Convention', ⁷⁵ Article 26 of The Vienna Convention on the Law of Treaties⁷⁶ provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' The UK must be held to account to see whether it has been guided by the CRC in the formulation of UK surrogacy regulation. In order to maximise the effect of the CRC as a tool for promoting children's rights, Kilkelly suggests that the principles and the provisions of the Convention should be used to offer guidance on the interpretation and application of the ECHR.⁷⁷ This 'would help to fulfil the potential of both treaties to protect and promote children's rights at the international level and at the domestic level where the ECHR is part of domestic law'.⁷⁸

It is acknowledged that tensions could arise between the underpinning theoretical frameworks of procreative liberty and children's rights, that are used in the thesis.

⁷⁴ *Ibid.*

⁷⁵ Joint Committee on Human Rights, 'The UK's compliance with the UN Convention on the Rights of the Child Eighth Report of Session 2014–15', para 18, p8, <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/144/144.pdf> (Last accessed 15/11/17).

⁷⁶ Vienna, 23 May 1969.

⁷⁷ U Kilkelly, 'The best of both worlds for children's rights: Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child'. (2001) *Human Rights Quarterly*, 23, pp 308–326.

⁷⁸ *Ibid.*

Allowing single parents, non-genetic parents and multiple parents to apply for a parental order following surrogacy, raises questions for the child's rights, particularly their right to identity which is inherent in Articles 7 and 8 CRC and Article 8 of the ECHR. Therefore, it is important to clarify that whilst this thesis advocates greater procreative freedom for intended parents (particularly when it comes to applying for a parental order) this must always be balanced with a consideration of how it will affect the child. This is consistent with the Parental Order Regulations 2010 which state that the child must be the Court's *paramount* concern in parental order applications. Therefore, the chapters on procreative liberty are 'filtered' with a subsequent chapter considering the children's rights issues. For instance, chapter 2 considers how the procreative liberty of single parents are affected by the 'relationship provisions' in section 54 HFEA 2008 and the following chapter 3 considers how the relationship provisions – and any reforms suggested in chapter 2 – affect the rights of the child. Again, in chapters 6 and 7 the problems with DIY and international commercial surrogacy arrangements are looked at from the perspective of the intended parents *and* the children involved, to ensure that reforms do not just increase procreative liberty but also centralise the rights of the child.

1.2 A Roadmap to the Thesis

Before the thesis took shape, key judgments including '*Baby Cotton*',⁷⁹ *X & Y (Foreign Surrogacy)*,⁸⁰ and *CW v NT and another*,⁸¹ were read and analysed. This process helped to identify some of the main issues with UK surrogacy regulation, including payments, cross-border surrogacy and DIY arrangements. It also led to a discovery of 'Family Law Week',⁸² a valuable research tool containing many of the judgments on surrogacy and parental orders, and updates on legal reform. All the surrogacy cases heard by the English judiciary were read and the majority are used throughout the thesis to highlight problems with UK surrogacy regulation.⁸³ Much of

⁷⁹ *Op cit*, n2.

⁸⁰ *Op cit*, n20.

⁸¹ *Op cit*, n29.

⁸² <https://www.familylawweek.co.uk/site.aspx?i=ho0> (last accessed 27/01/19).

⁸³ No surrogacy cases heard by the judiciary in Wales or Northern Ireland were identified. Only one case heard by the Scottish courts was identified, *C and C v S* 1996 S.L.T. 1387. The English

the secondary literature on procreative liberty⁸⁴ and children's rights⁸⁵ was identified at the early stages of the project, along with important commentators in the area of surrogacy law.⁸⁶ Some of the secondary literature was identified after taking part in the *Children's Rights Judgment Project*⁸⁷ and other secondary material, including Martha Fineman's *The Neutered Mother*⁸⁸ was discovered at a later stage in the thesis. These sources were used to develop the themes of procreative liberty, children's rights and the nuclear family.

Chapter 2 explores the human rights implications of the 'relationship provisions' in section 54 HFEA 2008. To apply for a parental order, the intended parents must be 'husband and wife',⁸⁹ 'civil partners'⁹⁰ or 'two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other'.⁹¹ The preference towards the two-parent 'sexual family' inherent in these provisions, can be traced back to the *Warnock Report* where it held that 'the interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship...with both father and mother...'.⁹² The HFEA 1990's exclusion of unmarried parents and homosexual couples from the moral vision of the 'family' also exposes how surrogacy regulation is underpinned by the

cases apply to the whole of the UK.

⁸⁴ J Robertson, *Children of Choice, op cit*, n37.

⁸⁵ J Tobin, *op cit*, n62. The book edited by H Stalford, K Hollingsworth and S Gilmore (*op cit*, n55) was incorporated later in the thesis after it was published in 2017.

⁸⁶ Including work by M Crawshaw and E Blyth, *op cit*, n27; M Freeman, *op cit*, n4; K Horsey, 'Fraying at the Edges: UK Surrogacy Law in 2015', *Medical Law Review*, Volume 24, Issue 4, 1 November 2016, pp608–621, <https://doi.org/10.1093/medlaw/fww013>; and A Alghrani, D Griffiths and M Brazier "Surrogacy Law: From Piecemeal Tweaks to Sustained Review and Reform" in Alison Diduck, Noam Peleg and Helen Reece, (eds) *Law In Society: Reflections on Children, Family, Culture and Philosophy- Essays in Honour of Michael Freeman* (2014, Brill Publishers) pp425-453.

⁸⁷ I took part in the *Children's Rights Judgments Project* between 2014-17 and contributed to the edited collection (*op cit*, n55). The project helped me identify sources on children's rights, including work by M Freeman.

⁸⁸ *Op cit*, n35.

⁸⁹ Section 54(2)(a) HFEA 2008.

⁹⁰ Section 54(2)(b) HFEA 2008.

⁹¹ Section 54(2)(c) HFEA 2008.

⁹² *Op cit*, n5, para 2.9.

‘sexual family’. The legislation was updated in 2008, to allow same-sex couples, those in civil partnerships and those in ‘enduring family relationships’ to apply for a parental order. The HFEA 2008 also extended access to single and same sex couples using artificial reproductive technologies to create a family.⁹³ Nevertheless, single parents continue to be excluded from applying for a parental order, which echoes the outdated two-parent model endorsed by the *Warnock Committee*. In 2016, Lady Warnock noted how three decades on, she regrets how the Committee treated the practice in 1984:

‘I do feel rather ashamed of the stance that I took about surrogacy ... I’m sure we could have done better.’⁹⁴

The regulation’s preference towards the ‘sexual family’ must be revisited. As Morgan notes, ‘the most radical challenge to understandings of the family has been presented by assisted conception...The legal, biological and social constructs of parenthood have all faced vigorous re-examination, and new definitions and new family forms have become available’.⁹⁵ Same-sex couples can adopt,⁹⁶ single people can also adopt,⁹⁷ and single women are entitled to become parents using In Vitro Fertilisation (IVF).⁹⁸ Despite these progressive changes, the two-parent ‘ideal’ continues its grip upon the law regulating surrogacy and there is ‘increasing tension between the respective roles of biology, intention and functional parenting in the attribution of legal

⁹³ See J McCandless and S Sheldon, “‘No Father Required’? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008”, *Feminist Legal Studies* (2010) 18:201–225.

⁹⁴ BioNews, 1st February 2016, ‘Meeting Mary Warnock’, K. Horsey and S. Avery, available at http://www.bionews.org.uk/page_611935.asp (accessed 23/05/16).

⁹⁵ D Morgan ‘The Surrogacy Issue: Who Is the Other Mother?’ (1994) 8 *International Journal of Law and Family*, 386–412. At pp387–88.

⁹⁶ The ACA 2002.

⁹⁷ Section 1(3) of the Adoption Act 1926, sections 14 and 15 of the Adoption Act 1976 and, now, section 51 of the ACA 2002.

⁹⁸ The HFEA 2008 Act deleted section 13(5) HFEA 1990, that clinicians consider the need for a father of any potential child before offering a woman treatment and substituted for it a requirement that clinicians must consider the child’s need for ‘supportive parenting’, thus allowing single women and lesbian couples to use IVF.

parental status’.⁹⁹ Single parents¹⁰⁰ and co-parents¹⁰¹ use surrogacy to create a family but are denied a parental order, which is the most appropriate order for acquiring legal parenthood and parental responsibility for a surrogacy-conceived child.¹⁰² Chapter 2 critically reflects on the potential human rights violations of the relationship provisions and considers whether a more inclusive definition of parenthood is achievable to reflect today’s diverse family forms.

Chapter 3 continues to explore the problematic ‘relationship provisions’, this time through the lens of children’s rights. The government’s assertion that surrogacy-conceived children require two parents who are in an enduring family relationship is questioned. The judiciary’s response to the exclusion of single parents in ‘*Re Z*’ and ‘*Z (A child) (No 2)*’¹⁰³ is considered and it is asked whether Munby P’s approach is consistent with a child rights-based approach.¹⁰⁴ The chapter aims to highlight how the relationship provisions, which deny children with less conventional families a parental order, affect the child’s rights to identity.¹⁰⁵

The grip of the ‘sexual family’ upon surrogacy regulation is a topic that is also explored in chapters 4 and 5. Section 54(1)(b) of the HFEA 2008, provides that one of the perquisite’s to applying for legal parentage and a parental order is that ‘the gametes of at least one of the applicants were used to bring about the creation of the embryo...’. Where neither intended parent has contributed their gametes to the creation of the embryo, that couple cannot apply for a parental order. Chapter 4 considers how

⁹⁹ T Callus, 2012. ‘A New Parenthood Paradigm for Twenty-First Century Family Law in England and Wales?’ *Legal Studies* 32 (3): 347–368.

¹⁰⁰ *Re B v C*, *op cit*, n25; *Re Z (A Child: Human Fertilisation and Embryology Act: parental order)* [2015] EWFC 73 (hereafter ‘*Re Z*’); *In the matter of Z (A Child) (No 2)* [2016] EWHC 1191 (Fam) (hereafter ‘*Z (A Child) (No 2)*’).

¹⁰¹ See V Jadvā, T Freeman, E Tranfield and S Golombok, ‘“Friendly allies in raising a child”: a survey of men and women seeking elective co-parenting arrangements via an online connection website’, *Human Reproduction*. Vol. 30, No. 8 pp.1896–1906, 2015, which discusses the rise of co-parenting arrangements.

¹⁰² *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam), (Munby P) [7].

¹⁰³ *Op cit*, n100.

¹⁰⁴ K Hollingsworth and H Stalford, *op cit* n55 above; J Tobin, *op cit*, n62; and U Kilkelly, *op cit*, n77.

¹⁰⁵ Articles 7 and 8 CRC; and Article 8 ECHR.

‘doubly-infertile’ intended parents are marginalised by the genetic requirement and explores two cases, one from South Africa¹⁰⁶ and the other from the ECtHR,¹⁰⁷ to see whether the genetic requirement violates Articles 8 and 14 of the ECHR. One of the main aims of the chapter is to address, and rebut, the oft-cited argument that doubly-infertile parents should ‘adopt instead’. It is considered whether Robertson’s procreative liberty framework could be modified to encompass double-donor surrogacy. Chapter 5 continues to explore the tensions between biological, gestational and social / psychological claims to parenthood. It considers whether the motherhood provision in section 33 HFEA 2008 – which assigns legal motherhood to the surrogate and ‘no other woman – is in the best interests of the child. The chapter also considers whether assigning legal parenthood to the child’s intended parents could help refocus the law away from family structure, to the ‘actual contingencies of care-giving’.¹⁰⁸

Chapter 6 explores how surrogacy is practised by intended parents and whether UK regulation has driven prospective parents into risky ‘DIY’ arrangements, facilitated by the ‘dangerous and murky waters of the internet’.¹⁰⁹ DIY arrangements are appealing for intended parents, who can circumvent the lengthy waiting lists for joining a non-profit organisation, meet a wider range of surrogates, and avoid the watchful eye of a professional organisation. However, this thesis aims to demonstrate how DIY arrangements can go wrong and, when this happens, the problems outweigh any procreative freedom the intended parents hope to achieve by ‘going it alone’. A combination of empirical and doctrinal analysis is used to explore the types of DIY arrangements entered into by UK intended parents and the consequences that emerge when these arrangements go awry.

¹⁰⁶ *AB v Minister of Social Development As Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580; 2016 2 SA 27; [2015] 4 All SA 24. Hereafter ‘*AB v Minister of Social Development* (HC); *AB and Another v Minister of Social Development* [2016] ZACC 43. Hereafter ‘*AB and Another* (CC)’.

¹⁰⁷ *Paradiso and Campanelli v Italy* Appl no. 25358/12 (ECtHR, 27 January 2015, Second Chamber) (ECtHR, 24 January 2017, Grand Chamber). Hereafter ‘*Paradiso*’ and ‘*Paradiso* (GC)’ respectively.

¹⁰⁸ M Fineman, *op cit*, n36.

¹⁰⁹ *CW v NT and Another*, *op cit*, n29. At [38] (Baker J).

In addition to DIY arrangements, prohibitive surrogacy regulation in the UK has driven some intended parents overseas, to more surrogacy-friendly jurisdictions.¹¹⁰ Doctrinal analysis of the cases and interviews carried out with intended parents, who had children after entering international commercial surrogacy arrangements, are used to explore the factors influencing the decision to use cross-border surrogacy arrangements. The chapter considers which law reforms could help encourage intended parents to use surrogacy in the UK, rather than entering high risk DIY and international arrangements.

1.3 Bringing the Research to Life through Empirical Work

To add to the theoretical and doctrinal analysis, a small-scale qualitative study was undertaken, to learn more about the experiences of surrogates and intended parents involved with surrogacy in the UK or overseas. Ethical approval¹¹¹ was obtained for this study and the empirical findings are used throughout the thesis to illustrate problems with the law for children's rights and procreative liberty.¹¹² The qualitative study involved audio-recorded telephone interviews with eight intended parents and two surrogates,¹¹³ who responded to an advert on 'Family Law Week'.¹¹⁴ All participants were given an information sheet,¹¹⁵ which included contact details, information about the aims of the research, details of the risks involved, and information about data storage and confidentiality. Informed consent was obtained from all the interviewees included in the thesis.¹¹⁶ At one end of the interviewing

¹¹⁰ The Hague Conference on Private International Law, 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements drawn up by the Permanent Bureau', Preliminary Document No 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, para 5, p 7. Available at, <<https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>> (last accessed 15/11/17).

¹¹¹ See Appendix One, 'Evidence of Ethical Approval'.

¹¹² The empirical case studies feature most predominantly in chapters 4-7.

¹¹³ See Appendix Five 'Pseudonyms and Interview Codes'. Only participants who signed the consent form have been included in the thesis.

¹¹⁴ <http://www.familylawweek.co.uk/site.aspx?i=ed160230> (last accessed 25/06/18).

¹¹⁵ Appendix Three, 'Participant Information Sheet'.

¹¹⁶ Appendix Two 'Participant Consent Form'.

spectrum is the structured interview which is composed of closed questions and fixed choice responses.¹¹⁷ At the other end of the spectrum, is the unstructured interview which involves open-ended questions. Semi-structured interviews, which include a ‘combination of closed and open questions aimed at collecting both factual and attitudinal data’,¹¹⁸ were conducted.¹¹⁹ The semi-structured interview approach was used because it generated a discussion about how surrogates and intended parents felt about surrogacy regulation and their factual experiences with the process. This approach led to ‘unexpected, unanticipated and serendipitous responses...which reveal[ed] new lines of thinking in terms of relationships or hypotheses’.¹²⁰ For instance, in one interview with Liz, the approach led to an unanticipated discussion about gamete donor anonymity.¹²¹ Overall, the flexibility of the semi-structured technique led to some unexpected and fruitful responses, while the structure helped to keep the interviews focussed on relevant issues.

Originally, two online surveys were designed to ascertain the level of satisfaction that intended parents and surrogates have with the current system of regulation. Online links to the survey were made available on ‘Family Law Week’. However, the survey data was not used because it was unreliable. This is because SelectSurvey – the survey platform provided by the University – did not allow for participants to be given an individual username and password. As such, anyone could log onto the survey without their identity being verified. Some of the answers indicated that participants had taken the survey more than once or did not have experience of surrogacy. It was decided that the interview responses were more reliable, so the survey data was discarded.

During the telephone interviews theoretical sampling was used. According to Draucker *et al.*, theoretical sampling occurs when ‘data collection and analysis occur simultaneously’.¹²² This was achieved in the qualitative study by simultaneously

¹¹⁷ P McNeill and S Chapman (2005), *Research Methods*. 3rd ed. Routledge, p6.

¹¹⁸ *Ibid*, p57.

¹¹⁹ Appendix Four, ‘Sample of Interview Questions’.

¹²⁰ P McNeill and S Chapman, *op cit*, n117, p59.

¹²¹ Interview 05IM, recorded on 26/08/16 (interview on file with the author).

¹²² Draucker, C. B., Martsof, D. S., Ross, R. & Rusk, T. B. (2007) ‘Theoretical Sampling and Category Development in Grounded Theory’. *Qualitative Health Research*, 17, 1137-1148, p1139.

comparing the interview transcripts and collapsing them into categories and codes. The interview questions were often refocused and differed to those in the interview schedule. This use of theoretical sampling helped generate specific information about emerging concepts, including the circumvention of donor anonymity rules,¹²³ a topic which was not initially included in the interview schedule. The semi-structured interviews with the intended parents and surrogates included a ‘life history’ approach. Life history presents an individual’s experience of particular events,¹²⁴ in this case surrogacy. According to this approach, ‘research relies heavily on interview data, but this may be cross-referenced to documents and other secondary sources’¹²⁵ such as case law, legal advice and diary entries. The purpose of the life history approach is to ‘give voice’ to those who have experienced surrogacy and to ‘awaken public understanding and concern for the issue’.¹²⁶ The interviews gave a powerful insight into the surrogates’ and intended parents’ experiences with surrogacy.

There was a risk that the interviews would cause emotional distress for the intended parents, who talked about a very intimate area of their personal lives, including fertility problems. Similarly, the surrogates also revealed their personal motivations and the problems they encountered with the law. Two safeguards were implemented: (1) the participant would be offered a break if they became distressed and (2) the interview would be stopped completely, if the participant became overly distressed. These safeguards were not needed during any of the ten interviews. One of the limitations with conducting telephone interviews was a reduced ability ‘to monitor, support, or even terminate the study if adverse reactions become apparent.’¹²⁷ Nevertheless,

¹²³ Interview 05IM, recorded on 26/08/16 (on file with the author).

¹²⁴ S Germeten, ‘Personal Narratives in Life History Research’, *Scandinavian Journal of Educational Research*, 2013, J Routledge Vol. 57, No. 6, 612-624.

¹²⁵ M Hammond and J Wellington (2013), *Research Methods: The Key Concepts*. 1st ed. Routledge, pp97-99.

¹²⁶ *Ibid.*

¹²⁷ British Psychological Society (2013). *Ethics Guidelines for Internet-mediated Research*. INF206/1.2013. Leicester: Author. Available from: <https://www.bps.org.uk/sites/bps.org.uk/files/Policy%20%20Files/Ethics%20Guidelines%20for%20Internet-Mediated%20Research%20%282013%29.pdf> (last accessed (05/10/18)).

verbal cues and changes to the participants' tone were monitored. Ultimately, the interviewees led the discussion, which allowed them to tell their stories.

The study originally planned to use NVivo, a type of Computer Aided Qualitative Data Analysis Software (CAQDAS), to facilitate in-depth qualitative analysis of textual data sources.¹²⁸ However, coding databases were set up using Microsoft Word instead. This software proved easier to make codes and organise quotations from the transcripts. Coding is an 'interpretive, analytic process in which thinking about the data is extended beyond the descriptive to a more abstract level'.¹²⁹ The following codes emerged from the interview transcripts: (1) 'relationship and contact with the surrogate', (2) 'parental orders', (3) 'genetic relatedness', (4) 'intended parents' involvement in the process', (5) 'international surrogacy', and (5) 'Do-it-Yourself surrogacy'. It is important to acknowledge that the sample size of the study, eight intended parents and two surrogates, is small. As such, the interviews are used as real-life case studies to illustrate the issues, rather than as an indicative sample. Nevertheless, the views and experiences of the surrogates and intended parents interviewed resonate with much of the existing research around the topic, and on-going calls for reform.¹³⁰ The interview participants are anonymised in this project and pseudonyms have been used to protect their identity. A few words about their character and circumstances will lend some colour to the research.

(I) Introducing the Intended Parents

(a) *Bea*¹³¹

¹²⁸P Bazeley & L Richards (2005), *The Nvivo Qualitative Project Book*, SAGE Publications, chapter 4.

¹²⁹ *Ibid.*

¹³⁰ See A Alghrani and D Griffiths, *op cit*, n1; M Crawshaw *et al.*, *op cit*, n27; K Horsey and S Sheldon, 'Still Hazy After All These Years: The Law Regulating Surrogacy', *Medical Law Review*, 20, Winter 2012, pp. 67–89; and Surrogacy in the UK: Myth Busting and Reform, *Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (November 2015): <https://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> (last accessed 13/04/18).

¹³¹ Interview 01IM, recorded on 15/07/16 (on file with the author).

Bea and her husband Jack became parents to twins after entering a surrogacy arrangement in the UK with a surrogate, Pippa. The surrogate was married and domiciled in the UK. The couple decided to use surrogacy because Bea could not fall pregnant naturally due to Crohn's disease. Operations on her abdomen left her fallopian tubes damaged from infection. After trying IVF, the 'next logical step'¹³² for them was surrogacy. Bea and Jack joined one of the main non-profit surrogacy organisations in the UK, (COTS).¹³³ However, they met Pippa through a secret 'Facebook' group. This was Pippa's seventh pregnancy, so it was high risk, especially as she became pregnant with twins. It is assumed that Bea and / or Jack are genetically related to the twins, because they were awarded a parental order which requires at least one of the parties to have contributed their gametes to the creation of the child.¹³⁴ The relationship between Bea and Pippa deteriorated during the pregnancy due to several factors which are discussed in the thesis. When Bea and Jack applied for a parental order seven weeks after the children's births, Pippa refused to consent 'for a long time' and would not communicate with the Child and Family Court Advisory and Support Service (CAFCASS).¹³⁵ This led to delay and meant the children's long birth certificate was not issued until 18 months after their birth. Bea and Jack's case will be used (particularly chapter 6) to consider the causes and problems of 'do-it-yourself' surrogacy arrangements facilitated by the internet.

(b) *Sophie*¹³⁶

At the time of Sophie's interview, she was 35 and had a one-year old son with her husband Will, via surrogacy. Sophie's eggs were used to create the child along with Will's sperm. Sophie and Will entered into a surrogacy arrangement in the UK with a

¹³² *Ibid.*

¹³³ COTS website, <https://www.surrogacy.org.uk/> (last accessed 17/07/18).

¹³⁴ Section 54(1)(b) HFEA 2008. It was not disclosed whether Bea and / or Jack are genetically related to the twins.

¹³⁵ 'Cafcass looks after the interests of children involved in family proceedings. It is independent of the courts and social services, but works under the rules of the Family Court and legislation to work with children and their families, and then advise the courts on what is considered to be in the best interests of individual children.' <https://www.gov.uk/government/organisations/children-and-family-court-advisory-and-support-service> (last accessed 05/10/18).

¹³⁶ Interview 02IM, recorded on 09/07/16 (on file with the author).

surrogate, Ellen, who was a UK national and domiciled in the UK. Sophie decided to use surrogacy after developing a bladder pain condition in her early 20's. She had been with Will since she was 20 and they had always wanted to have children together. They decided to use surrogacy to have a child that was genetically related to them both. Sophie and Will joined COTS¹³⁷ and were matched with a surrogate. They spent a lot of time getting to know Ellen and her family, and were in weekly contact over the telephone. Sophie and Will applied for a parental order around seven weeks after their son was born. Sophie and Will's case is used in the thesis to explore the advantages of using a non-profit surrogacy organisation like COTS, and to question whether intended parents should be awarded legal parenthood earlier on.

(c) Rosie¹³⁸

Rosie decided to use surrogacy because she could not carry a pregnancy to term. She and her husband, Gareth, tried to become parents for six years before joining Surrogacy UK (SUK),¹³⁹ another not-for-profit surrogacy agency, where they met their surrogate Penny. The embryo was created using Rosie's eggs and donor sperm. During the pregnancy Rosie and Gareth were in regular contact with their surrogate, Penny. Their case is used to consider whether the intended parent's should be given legal parenthood earlier on.

(d) Steve¹⁴⁰

Steve and his partner Robert, a same-sex couple, had a child via surrogacy. Robert's sister donated her eggs to the couple and Steve used his sperm, making him the biological father. The couple lived in Scotland and originally joined SUK to try to find a surrogate. After being part of the charity for almost two years Steve and Robert had not yet found their surrogate and felt their location in Scotland deterred surrogates from offering to help. Since Robert is American, and their embryos were stored in America, they chose to enter a commercial surrogacy arrangement in the US. They

¹³⁷ *Op cit*, n133.

¹³⁸ Interview 03IM, recorded on 11/07/16 (interview on file with the author).

¹³⁹ SUK website, <https://www.surrogacyuk.org/> (last accessed 08/06/18).

¹⁴⁰ Interview 04IF, recorded on 07/10/16 (interview on file with the author).

met their surrogate, Anna, an American surrogate living in the US, through a friend. The intended parents and Anna spent time getting to know each other in the States. Before Anna gave birth to Steve and Robert's son, they received the American birth certificate for the child. However, when the couple returned to the UK they had to apply for a parental order and spent thousands of pounds on the surrogacy and legal fees. They paid for 'really expensive legal representation' with the full fees amounting to £25,000 'on top of the nearly £200,000' the couple already spent on the surrogacy.¹⁴¹ Steve believes that the law should permit commercial surrogacy in the UK and feels that this would encourage more surrogates to offer their help. Steve and Robert's case is used in Chapter 7 to consider the problems with international commercial surrogacy arrangements.

(e) Liz¹⁴²

Liz and her husband Dan had twins through surrogacy after entering an international commercial surrogacy arrangement in India. They initially tried SUK in 2009, but it had a three-year waiting list due to a shortage of surrogates. The couple decided to enter an international commercial surrogacy arrangement in India and used two Indian surrogates to carry their twins. The children are full biological siblings; their biological father is Dan and their biological mother is an anonymous egg donor from Cape Town. When the children were born, Liz lived in India for four months whilst waiting for permission to return to the UK with the twins. When she returned Liz applied for a parental order after a month or so. The case was heard by Wall P who was concerned about the payments that had been made to the surrogates and Indian clinic.¹⁴³ Nevertheless, parental orders were granted as it was 'plainly in the interests of these two children that they should be brought up by [the couple] as their parents.'¹⁴⁴ Liz gave access to her diary which recorded her time in India. Details from the diary have not been recorded in this thesis but have helped build a bigger picture of Liz's experiences of international commercial surrogacy and her time in India. Liz's case is

¹⁴¹ *Ibid.*

¹⁴² Interview 05IM, recorded on 26/08/16 (interview on file with the author).

¹⁴³ *In the matter of X and Y (Children) And in the matter of Section 54 of the Human Fertilisation and Embryology Act 2008* [2011] EWHC 3147 (Fam).

¹⁴⁴ *Ibid.*, [41] (Wall P).

used in the thesis to consider the factors driving UK intended parents overseas; the legal and practical implications of commercial arrangements overseas; and whether the ‘reasonable expenses’ requirement in section 54(8) HFEA 2008 is sustainable. Liz’s case is also used to look at the rules on UK gamete donor anonymity and whether, from the child’s point of view, intended parents should be able to circumvent these rules by using overseas donors.

(f) Gemma¹⁴⁵

At the time of the interview, Gemma was an intended mother who entered a surrogacy arrangement in the UK with her friend Sinead, the surrogate. Gemma had endometria cancer when she was 30 and had to have a full hysterectomy. Sinead offered to be a surrogate and at the time of interview was eight months pregnant. Gemma’s case is interesting because not only is she a single mother, she does not have a genetic tie to the child either. This means the HFEA 2008 doubly discriminates against her with its preference towards the ‘sexual family’. Gemma’s case is used to highlight that single parents of choice and non-genetic parents are excluded from the legislation and cannot apply for a parental order.

(g) Lauren¹⁴⁶

Lauren and her husband Zak entered a surrogacy arrangement in the UK, with a surrogate Molly, who is also domiciled in the UK. Lauren found out she would never be able to get pregnant or carry her own child when she was 15. She was diagnosed with Mayer Rokitansky Kuster Hauser syndrome (MRKH),¹⁴⁷ a congenital absence of the uterus which meant she was unable to get pregnant. She thought about adoption but decided from 15, that she would use surrogacy. Lauren and Zak joined SUK. Lauren explained that SUK is based on friendship and investing in a genuine bond. They got to know their surrogate, Molly, and her family over six months. After six months Lauren, Zack and Molly sat down with a mediator from SUK and went through

¹⁴⁵ Interview 06IM, recorded on 11/07/16 (interview on file with the author).

¹⁴⁶ Interview 07IM, recorded on 15/07/16 (interview on file with the author).

¹⁴⁷ <https://www.mrkh.org.uk/mrkh.html> (last accessed 28/08/18).

an agreement form¹⁴⁸ which covered every single aspect of the surrogacy, from ‘diet to contact levels during, before and after’ the surrogacy. After being happy with the agreement, Lauren, Zak and Molly signed it and started treatment.

When Lauren and Zak applied for a parental order, they found the technical aspect, the parental order application form, very simple.¹⁴⁹ However, the couple felt they were in a vulnerable situation with regards to parenthood. The parental order was not granted until the children were 15 months old due to administrative errors on the part of the courts and CAFCASS. Until the parental order was awarded, Lauren and Zak were not the children’s legal parents; Molly, the surrogate, was the legal mother due to section 33 HFEA 2008. Lauren was unsure if she would have been able to give consent to emergency medical treatment if the children required it. This case is used to consider whether legal parenthood should be granted to intended parents at birth; the discrimination faced by single and non-genetic parents; and the arguments against commercial surrogacy.

(h) Sally¹⁵⁰

Sally and David, both domiciled in the UK, had a son through surrogacy. Sally did not have a womb and could not carry a child herself. Surrogacy was the only option for having a child that was genetically theirs. Sally’s eggs and David’s sperm were used to create their son. Sally’s mother Mary, also interviewed for this project, was the surrogate. This meant Sally and David did not have to worry about financial costs or the uncertainty of the surrogate changing her mind. Sally and David were there throughout the pregnancy. They found the parental order process difficult due to administrative errors from the court and CAFCASS. Sally’s case is used to consider the differences between using a family member as a surrogate and using an organisation like SUK or COTS.

(II) Introducing the Surrogates

¹⁴⁸ Which was non-binding due to the SA Act 1985.

¹⁴⁹ It is important to note however, that Lauren is a solicitor which might explain why she found the technical aspect unproblematic.

¹⁵⁰ Interview 08IM, recorded on 08/07/16 (interview on file with the author).

This section gives a few details about the two surrogates interviewed for the project.

(a) Kate¹⁵¹

At the time of interview, Kate had been a surrogate before and had started treatment for her second surrogacy. She does not have any children of her own and decided not to use her own eggs for this reason. She was a surrogate with SUK and decided to help a same-sex couple in 2013. Kate is still in contact with the couple and the child knows who she is. Kate's case is interesting because she agrees with the current law, that the surrogate should be recognised as the legal mother. Her case is used to consider the idea of 'multiple parenthood' and whether UK birth certificates should adopt a similar model to British Columbia, where up to five names can be put on the child's birth certificate.

(b) Mary¹⁵²

Mary's daughter Sally was diagnosed with MRKH when she was 16 which meant that she could not carry her own child. 10 years later Mary became aware of an American woman who had been a surrogate for her daughter. When Mary's daughter planned to get married to her partner, she offered to be a surrogate for them. In 2013 her promise became a reality and Mary gave birth to Sally's child; Mary was 48 at the time. Mary was unhappy that she and her husband (Sally's father) had to be on the birth certificate. Although the birth certificate was reissued after the parental order was made, she said that Sally was not completely happy with the wording because it 'did not reflect the fact they were the actual parents'.¹⁵³ Mary's interview is used to consider surrogacy arrangements between family members and whether parenthood should be assigned to the intended parents sooner.

1.4 Conclusion

This introductory chapter contextualised UK surrogacy regulation and introduced the two main policies reflected in current regulation: (1) the 'sexual family' form, and (2)

¹⁵¹ Interview 01SM, recorded on 07/07/16 (interview on file with the author).

¹⁵² Interview 02SM, recorded on 10/07/16 (interview on file with the author).

¹⁵³ *Ibid.*

a rejection of commercialisation. Alongside the doctrinal and theoretical analysis used to approach the research questions, the thesis will also use empirical ‘case studies’ from interviews with eight intended parents and two surrogates. The empirical study revealed some important lessons for future socio-legal research in this field. Firstly, the interview participants in this study were very private individuals. They had faced problems of infertility, discrimination, debt and the stigma of using surrogacy as a method to create a family. In future it is suggested that interviews should, ideally, take place in a face-to-face setting which might help the participant feel more at ease and able to expand on their experiences. Secondly, it would have been useful to conduct follow up interviews as an opportunity to: (a) resolve any unanswered questions that were missed during the first interview and, (b) see how the surrogate and intended parents have got on since the first interview in terms of receiving their parental order and levels of post-birth contact between the child and surrogate. Finally, it would be valuable, particularly for promoting a child rights-based approach in this field, to conduct interviews with surrogacy born children (possibly older children / adolescents). This could help generate a clearer idea about the experiences and feelings of surrogacy conceived children.

Nevertheless, the interviews conducted with the eight intended parents and two surrogates have been invaluable and their stories have helped illuminate the barriers and difficulties imposed by surrogacy laws and policy. The recent declaration of incompatibility issued by Munby P in ‘*Z (A Child) (No 2)*’,¹⁵⁴ and the Law Commission’s inclusion of surrogacy in its 13th Programme of Law Reform,¹⁵⁵ presents an opportune time to examine UK surrogacy regulation, which is ‘fraying at the edges’¹⁵⁶ and in need of urgent reform.

¹⁵⁴ *Op cit*, n100.

¹⁵⁵ <https://www.lawcom.gov.uk/surrogacy/> (last accessed 07/10/18).

¹⁵⁶ See K Horsey, *op cit*, n86.

2. The Human Rights Implications of the HFEA 2008's 'Relationship Provisions': What about Less Conventional Families?

2.1 Introduction

Adult sexual partnerships have been central to regulating family relationships in the UK. In 1995 Martha Fineman lamented that the 'sexual family', consisting of the married heterosexual couple and their genetically related offspring:¹

'Has been at the centre of the development of family law and policy, being assumed both as the reality for which legislation should be made and the ideal norm, which it should strive to enforce'.²

She explains that this has resulted in 'legislation that is more concerned with family form than the actual contingencies of care-taking relationships and dependency'.³ This chapter argues that the Human Fertilisation and Embryology Act 2008 (HFEA) is no exception to this criticism. Section 54 provides that only two people, who are 'husband and wife',⁴ 'civil partners',⁵ or 'living as partners in an enduring family relationship'⁶ can apply for a parental order following surrogacy. These 'relationship provisions' reflect Fineman's concern that 'our societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and a

¹M Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge: New York and London, 1995) 143.

² *Ibid.*

³ *Ibid.*

⁴ Section 54(2)(a) HFEA 2008.

⁵ Section 54(2)(b) HFEA 2008.

⁶ Section 54(2)(c) HFEA 2008.

woman’⁷ rather than the ‘actual contingencies of care-taking relationships’.⁸ Consequently, UK surrogacy regulation has reinforced the primacy of the two-parent family as the ideal environment to procreate, thus marginalising the procreative choices of individuals who do not subscribe to this model.

By channelling parents into these rigid categories, the HFEA 2008 ignores the reality that single parents and co-parents, who are not necessarily in a sexual relationship, use surrogacy.⁹ This chapter uses doctrinal analysis to explore the human rights of intended parents who do not conform to the ‘relationship provisions’ and are prevented from acquiring legal parenthood and parental responsibility through a parental order.¹⁰ Leading cases from the European Court of Human Rights (ECtHR) suggest that the right to become a genetic parent, falls within Article 8’s protection for a private and family life.¹¹ In *Evans v UK*¹² it was held that private life:

‘...is a broad term encompassing, inter alia, aspects of an individual’s physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world... incorporates the right to respect for both the decisions to become and not to become a parent.’¹³

Soon after, the Grand Chamber considered another UK assisted reproduction policy in *Dickson v United Kingdom*.¹⁴ A majority of 5:2 held there had been a violation of

⁷ M Fineman, *op cit*, n1.

⁸ *Ibid.*

⁹ *Re B v C (Surrogacy: Adoption)* [2015]; *Re Z (A Child: Human Fertilisation and Embryology Act: parental order)* [2015] EWFC 73 (hereafter ‘*Re Z*’); *In the matter of Z (A Child) (No 2)* [2016] EWHC 1191 (Fam) (hereafter ‘*Z (A Child) (No 2)*’).

¹⁰ A parental order confers joint and equal legal parenthood and parental responsibility upon both intended parents and fully extinguishes the parental status of the surrogate under English law. This ensures the child’s security and identity as lifelong members of the intended parent’s family. See *J v G* [2013] EWHC 1432 (Fam), para [27] (Theis J).

¹¹ See M Eijkholt, ‘The Right to Found a Family as a Stillborn Right to Procreate?’ (2010) 18 *Medical Law Review* 127.

¹² *Evans v UK* App no 6339/05 (ECtHR, 10 April 2007). See also M Ford, ‘Evans v UK, What Implications for the Jurisprudence of Pregnancy?’ (2008) 8 *Human Rights Law Review* 171.

¹³ [71].

¹⁴ *Dickson v UK*, [2007] ECHR 44362/04 (Grand Chamber, 4 December 2007).

the applicant's Article 8(1)¹⁵ right and that 'the refusal of artificial insemination facilities concerned their private and family lives which notions incorporate the right to respect for their decision to become genetic parents'.¹⁶ In *S.H and Others*,¹⁷ the ECtHR clarified that the right to respect for the decisions to have, and not to have a child, fall within Article 8 ECHR¹⁸ and that the right to become a genetic parent also applies in the context of assisted reproduction.¹⁹ Although these leading cases have concerned access to reproductive treatments rather than 'the novel issues raised by legal regulation of surrogacy',²⁰ they demonstrate that the right to become a genetic parent is protected by Article 8 ECHR. This chapter aims to show how the provisions in section 54(2) HFEA 2008 violate Articles 8 and 14 ECHR because they prevent less conventional intended parents from acquiring the legal parenthood and parental responsibility necessary to look after their genetically related children. The legislation effectively punishes single people for making the 'incorrect' procreative choice and creating children outside the 'sexual family'.

It is recalled from the introductory chapter that procreative liberty is defined by Robertson in his seminal work, *Children of Choice*,²¹ as the right to procreate and the converse right not to.²² Robertson divided the right to procreate into two distinct sub-rights: (1) a right to procreate genetically related children and (2) a right to 'rear' one's genetic child.²³ Surrogacy facilitates genetic reproduction, however, the relationship provisions in the 2008 Act deny certain groups of parents an opportunity to apply for

¹⁵ 97(1).

¹⁶ [66].

¹⁷ *SH v Austria* (Application no 57813/00) Grand Chamber 3rd November 2011.

¹⁸ [80].

¹⁹ [82].

²⁰ A Mulligan, 'Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and The Regulation of Surrogacy Arrangements' *Medical Law Review*, 2018, Vol. 26, No. 3, pp. 449–475.

²¹ J. A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, 291pp, Princeton University Press (1996).

²² *Ibid.*

²³ See, J Robertson, 'Is there a Right to Gestate?' 2017, *Journal of Law and the Biosciences*, 1–7, lsx010, <https://doi.org/10.1093/jlb/lxx010>, where the author emphasises the right to genetic procreation. This was the author's last paper, which was published shortly after his death.

a parental order and regularise their status as the child's legal parents. This interferes with Roberson's second procreative right, to 'rear' one's genetic child. A parental order provides important stability for the child and their intended parent(s). As observed by Munby P in *Re X (A Child) (Surrogacy: Time limit)*,²⁴ the order recognises the biological connection between the child and the intended parent, and the intentions of the parties from the outset that the intended parents will be the child's legal and social / psychological parents.²⁵ Therefore, the narrow definition of parenthood currently afforded by the HFEA 2008 has serious consequences for families who do not conform to the two-parent model.

The first section of this chapter explores how the types of families created by surrogacy have transformed because of legal and social changes to our understanding of parenthood and family life. The *Warnock Committee's* view that it is immoral to have a child using ARTs or surrogacy outside the confines of the heterosexual married unit,²⁶ has radically altered and is out dated.²⁷ Single women and men now use surrogacy to procreate without a partner. This new type of family, referred to as 'single parenthood by choice', is discussed using case law,²⁸ literature²⁹ and empirical work. The motivations of 'single parents by choice', and whether the law has accommodated this emerging family form, are explored. The discussion provides the context for the second section, which critiques the legal response to single parent surrogacy families using two related judgments: '*Re Z*' and '*Z (A Child) (No 2)*'.³⁰ The cases concerned

²⁴ [2014] EWHC 3135 (Fam).

²⁵ *Ibid*, [7] (Munby P).

²⁶ M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter, '*Warnock Report*'. At 2.11.

²⁷ See for e.g. parliamentary debates on the child's 'need for a father' requirement in section 13 (5) HFEA 1990, which was replaced with the child's 'need for supportive parenting'. See <https://services.parliament.uk/bills/2007-08/humanfertilisationandembryologyhl/documents.html> (last accessed 10/01/18).

²⁸ *B v C*; '*Re Z*'; and, '*Z (A Child) (No 2)*', *op cit*, n9.

²⁹ See for example, V Jadv, S Badger, M Morrisette and S Golombok, 'Mom by Choice, Single by Life's Circumstances ... Findings from a Large Scale Survey of the Experiences of Single Mothers by Choice' (2009) 12(4) *Human Fertility* 175; and F Kelly, 'Autonomous from the start: single mothers by choice in the Canadian legal system', 24 *Child and Family Law Quarterly*, 257 2012, p257.

³⁰ *Op cit*, n9.

a single father who challenged the exclusion of single parents in section 54 HFEA 2008. In respect of the first, Munby P's reasoning for not 'reading down' the two-person requirement in that case is questioned, and it is asked whether the judicial response to the section 54 relationship provisions betrays a preference to the two-parent model. The implications of the second judgment, '*Z (A Child) (No 2)*', where a declaration of incompatibility was issued, are then explored. The acceptance of single parenthood in some contexts (e.g. In Vitro Fertilisation (IVF) and adoption), but not surrogacy, is also challenged as a form of discrimination.³¹

After exploring the human rights implications of the single parent exclusion, the next section questions whether the enduring family relationship requirement in section 54(2)(c) HFEA 2008 also violates Articles 8 and 14.³² This issue has been overlooked by the judiciary, commentators and policy-makers. Nevertheless, the provision has serious implications for less conventional intended parents, including co-parents. This section focuses in particular on the court's interpretation of the 'enduring family relationship' threshold in *Re F and M*³³ and *Re X (Surrogacy Time Limit)*.³⁴ It is considered whether a conjugal sexual relationship is at the heart of the court's interpretation of the provision and whether this could severely restrict less conventional families, including co-parents who want to have a child together but are not in a 'relationship', and extended kinship relationships such as single parents who have the support of their parents, siblings or older children.³⁵ In light of the potential human rights violations of the relationship provisions in section 54(2) HFEA 2008, this chapter critically reflects upon whether a more inclusive definition of parenthood and family is achievable.

³¹ Section 51 Adoption and Children Act 2002 clarifies that single people can adopt. Single women are also allowed access to IVF which has been made easier following the removal of section 13 (5) HFEA 1990 from the 2008 Statute.

³² Articles 8 and 14 ECHR respectively.

³³ (*Children*) (*Thai Surrogacy*) (*Enduring Family Relationship*) [2016] EWHC 1594 (Fam). Hereafter '*Re F and M*'.

³⁴ *Op cit*, n24.

³⁵ See for instance *B v C*, *op cit*, n9, where the single intended father's mother was the surrogate for his child.

2.2 The Rise of Single Parents by Choice: What are the Human Rights Implications of the Two-Parent Requirement?

In 1984, the majority of the *Warnock Committee* objected to surrogacy and stated that ‘even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case’.³⁶ Moreover, even the minority believed there were only ‘rare occasions when surrogacy could be beneficial to couples as a last resort’.³⁷ The Report explicitly favoured a two-parent model of the family:

‘The interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong’.³⁸

For the *Warnock Committee*, only the two-parent model was capable of providing the child with a loving and stable home.³⁹ Warnock acknowledged that there was a group of same sex men who were aware of ‘the potential of surrogacy for providing a single man with a child that is genetically his’.⁴⁰ The *Warnock Committee* rejected the use of surrogacy and ARTs in this way and argued that ‘as a general rule it is better for children to be born into a two-parent family, with both father and mother’.⁴¹ This reflects Fineman’s definition of the ‘sexual family’ which consists of a married heterosexual couple and their genetically related offspring.⁴² A number of social and legal changes have created greater acceptance of single parent families. Firstly, as Dewar argues, marriage has now been ‘displaced as the central concept linking law to

³⁶ *The Warnock Report, op cit*, n26,8.17.

³⁷ *Ibid*, ‘Expression of Dissent: A. Surrogacy’, p87.

³⁸ *Ibid*, 2.9.

³⁹ This was challenged at the time by S Golombok and J Rust ‘The Warnock Report and single women: what about the children?’ *Journal of medical ethics*, 1986, 12, 182-186. The authors did not ‘foresee special problems for children brought up in’ single parent families (p185). The children’s rights implications of the ‘relationship provisions’ are examined in the next chapter.

⁴⁰ *The Warnock Report, op cit*, n26, 2.10.

⁴¹ *Ibid*, 2.11, p11.

⁴² M. Fineman, *op cit*, n1, 143.

families'⁴³ and instead, other concepts such as cohabitation or parenthood have grown.⁴⁴ Separation and / or divorce has also created 'a social environment in which single mothering is common and somewhat accepted'.⁴⁵ Secondly, the mainstreaming of ARTs, 'and the relatively recent willingness of fertility clinics to provide services to single women, have all enabled single women to become mothers without the direct involvement of a male sexual partner.'⁴⁶ The *Warnock Committee's* promotion of the sexual family, to the exclusion of all others, is out of sync with these progressive changes.

(I) Single Parenthood by Choice

Single parenthood *by choice*, as distinct from single parenthood as a result of divorce or separation, has also become more acceptable. Research has largely focused on single mothers by choice (SMC),⁴⁷ which looks at 'women who make a conscious decision to have and raise a child without a male partner'.⁴⁸ The main example is single women who decide to use IVF and donor sperm to conceive and raise a child alone. Unlike divorced or unmarried single mothers, SMC (i.e. those using ARTs) make an active decision to parent alone.⁴⁹ This became possible in 2008 after the 'child's need for a father' requirement was controversially removed from section 13(5) of the HFEA 1990 and replaced with a requirement to consider the child's need for 'supportive parenting'.⁵⁰ This gave more rights to single women and lesbian couples, who can now

⁴³ J Dewar, 'Family Law and Its Discontents', *International Journal of Law, Policy and the Family* 14, (2000), 59-85, p61.

⁴⁴ *Ibid.*

⁴⁵ F Kelly, *op cit*, n29, p262.

⁴⁶ *Ibid.*

⁴⁷ *Op cit*, n29.

⁴⁸ E Sutherland, 'Man not included' - single women, female couples and procreative freedom in the UK', *Child and Family Law Quarterly*, Vol 15, No 2, 2003, p160.

⁴⁹ S Golombok, S Zadeh, and S Imrie, v Smith, T Freeman, 'Single Mothers by Choice: Mother-Child Relationships and Children's Psychological Adjustment', *Journal of Family Psychology*, 2016, Vol. 30, No. 4, 409-418, p410.

⁵⁰ The HFEA 2008 deleted the 'child's need for a father' requirement and replaced it with the 'child's need for supportive parenting'. 'Supportive parenting' is defined by the Human Fertilisation and Embryology Authority's Code of Practice (8th edition) in the following terms at para 8.11: 'Supportive parenting is a commitment to the health, well being and development of the

more easily undergo fertility treatment without the need for a male partner.⁵¹ SMC also choose surrogacy. During empirical work for this thesis, one single intended mother, Gemma,⁵² was interviewed about her experiences with surrogacy. At the time of the interview, the surrogate, Sinead, was eight months pregnant and Gemma was excited about the prospect of becoming a new mother. However, this excitement was also tinged with disappointment at the fact Gemma would not be able to apply for a parental order. She said, 'I don't think single people should be discriminated against' and hoped the law would change. It is discriminatory that single parents by choice are excluded from legislation; they deserve a legal framework that reflects their procreative decision to parent alone.

Aside from SMC, surrogacy presents an additional form of single parenthood by choice, which was rejected by the *Warnock Report*. It allows single men to create genetically related offspring with the help of a surrogate and egg donor. Single fathers by choice are described by Carone as 'heterosexual or gay men who actively choose to parent alone through adoption or, increasingly, surrogacy and egg donation.'⁵³ In the past, single fathers have been treated with suspicion by the law. When the Government debated the Adoption Act 1926, an amendment to remove the clause prohibiting sole male applicants from adopting female infants was withdrawn. Keating notes that the Bill's proposer, Sir Robert Newman, was outraged at the Bill's assumption:

'that the ordinary man who wants to adopt a child must necessarily do so for improper reasons ... Why a man, because he happens to be a bachelor or a widower, should be

child. It is presumed that all prospective parents will be supportive parents, in the absence of any reasonable cause for concern that any child who may be born, or any other child, may be at risk of significant harm or neglect. Where centres have concern as to whether this commitment exists, they may wish to take account of wider family and social networks within which the child will be raised.' Available at, < <https://www.hfea.gov.uk/media/2062/2017-10-02-code-of-practice-8th-edition-full-version-11th-revision-final-clean.pdf>> (Last accessed 22/08/18).

⁵¹ See J McCandless and S Sheldon. 2010. 'No Father Required'? The Welfare Assessment in the Human Fertilisation and Embryology Act (2008)' *Feminist Legal Studies* 18(3) 201-225.

⁵² Interview 06IM, recorded on 11/07/16 (interview on file with the author).

⁵³ N Carone, R Baiocco and V Lingardi, 'Single fathers by choice using surrogacy: why men decide to have a child as a single parent', *Human Reproduction*, Vol.32, No.9 pp. 1871-1879, 2017.

assumed to be an unfit person or not to have a proper reason for wishing to adopt a female child, I cannot understand.’⁵⁴

This attitude is also evident in Baroness Warnock’s objection to single, gay men using surrogacy:

‘We were told of a group of single, mainly homosexual, men ... campaigning for the right to bring up a child. Their primary aim at present is to obtain ... equal rights in the adoption field, but they are also well aware of the potential of surrogacy for providing a single man with a child that is genetically his... we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother although we recognise that it is impossible to predict with any certainty how lasting such a relationship will be.’⁵⁵

Despite providing no evidence whatsoever as to why, or how, single homosexual men using surrogacy would harm children, the HFEA 1990 was clearly influenced by Warnock’s suggestion and limited surrogacy to heterosexual married couples. Although the HFEA 2008 extended parental orders to those in civil partnerships and enduring family relationships, it chose to ignore the single men and women opting to use surrogacy. It is possible that men are particularly discriminated by the single parent exclusion in section 54 HFEA 2008 because single women can use IVF, providing they can carry a pregnancy to term, whereas single men are always dependent upon a surrogate to carry the child.

Unlike SMC, little research has been carried out to explore single fathers by choice,⁵⁶ or the barriers they encounter when using surrogacy. Carone’s study recruited 28 single fathers by choice to investigate the parent–child relationship and the child’s adjustment when the child was 3–8 years old. A further five single father surrogacy families with younger children (aged 9–30 months) were included, resulting in a total of 33 single fathers. All the fathers resided in Italy. The study is ‘the first to explore

⁵⁴ J Keating, *A Child for Keeps: The History of Adoption in England, 1918-45*, ‘Legislation Takes Shape’, p111 Ch 4, (2009) (Palgrave Macmillan).

⁵⁵ *The Warnock Report*, *op cit*, n26, 2.10-2.11.

⁵⁶ K M Johnson (2017) ‘Single, straight, wants kids: media framing of single, heterosexual fatherhood via assisted reproduction’, *Journal of Gender Studies*, 26:4, 387-401, DOI: 10.1080/09589236.2015.1108840.

the experiences and decisions of single men who actively choose to parent alone and build their family using surrogacy and egg donation'.⁵⁷ It revealed that single fathers by choice 'tell a similar story to that of single mothers who use donor insemination to conceive';⁵⁸ single fathers by choice are also well educated and financially secure in professional occupations. Moreover, their decision to have a child without a partner was 'complex and carefully considered, and one that was taken following discussion with family, friends, health practitioners and other single fathers'.⁵⁹ The study identified that the main reasons for deciding to become a single father by choice included: 'no longer wanting to wait for the right relationship', a desire to have a genetic child, and career and financial stability.⁶⁰ It is outdated and discriminatory, that this group of prospective parents are ignored by the HFEA 2008.⁶¹

The motivations of Italian single fathers by choice identified by Carone *et al.*, also correspond with the story of Ian Mucklejohn. In February 2001, Mr Mucklejohn, then 54, became the first known single man in the UK to have genetic children by surrogacy. Here he explains his reasoning for founding his family via this route:

"I hadn't found someone to spend the rest of my life with, nor was I arrogant enough to assume there was somebody who'd wish to spend their lives with me," he says. "But I'd always wanted a family, as far back as I can remember."⁶²

Mr Mucklejohn found an American egg donor and a surrogate to carry the triplets to term in the US. It was only later when he returned to the UK and sought to have his relationship as the child's father legally recognised, he ran into difficulty due to the provisions in the HFEA 1990. The choice to become a single parent is not unique to the UK, with single fathers using surrogacy to have genetically related offspring in

⁵⁷ N Carone *et al.*, *op cit*, n53, p1877

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p1876.

⁶¹ See *B v C*; '*Re Z*'; and '*Z (A Child) (No 2)*', *op cit*, n9.

⁶² The Telegraph, 19th June 2016, 'The UK's first male surrogate on life as a single dad of tearaway teen triplets', available at <http://www.telegraph.co.uk/men/fatherhood/the-uks-first-male-surrogate-on-life-as-a-single-dad-of-tearaway/> (last accessed 24/05/17).

India,⁶³ the US⁶⁴ and as Carone *et al's* study demonstrates, Italy. Despite the rise of single parents by choice, the HFEA 2008 has not been revised to accommodate single parent surrogacy families in the UK. This is contrary to the Grand Chamber's decision in *EB*,⁶⁵ which clarified that the right to become a parent should not depend on one's sexual status. In *EB* the applicant's status concerned sexual orientation but there is no reason why *EB* would not apply to other statuses, including relationship status.⁶⁶ As such, the relationship provisions in section 54 HFEA 2008 are inconsistent with the parenting rights developed by Strasbourg.

A more recent example of the discrimination faced by single intended fathers using surrogacy is evident in the judgment, *B v C*.⁶⁷ The resulting child, A, was conceived using a donor egg and B's sperm, following transfer of the embryo to C, who carried A until full term.⁶⁸ The gestational surrogate (C) was the intended father's mother. C's husband, D, fully supported the arrangement.⁶⁹ C agreed to undertake this role when another maternal relation, who had offered to be a surrogate for B, had to withdraw prior to any treatment, due to her own medical position.⁷⁰ Under the HFEA 2008 provisions, C and D were the legal parents of A.⁷¹ Unable to apply for a parental order, B decided to make an adoption application instead, which was made with the full support of C and D.⁷² Theis J stated that, 'An adoption order will provide the legal security to A's relationship with B, which will undoubtedly meet A's long term welfare needs.' However, Theis J's conclusion in *B v C* calls into question the same judge's

⁶³ The Indian Express, June 6th 2017, 'Pursuit of Happiness', <<http://indianexpress.com/article/entertainment/pursuit-of-happiness-8-4690650/>> (accessed 11/06/17).

⁶⁴ The Guardian, 2nd November 2013, 'Why Men Decide to Become Single Dads', <https://www.theguardian.com/lifeandstyle/2013/nov/02/men-single-dad-father-surrogacy-adoption> (last accessed 11/06/17).

⁶⁵ *E.B. v. France* (no. 43546/02). 22 January 2008 (Grand Chamber).

⁶⁶ In '*Z (A Child) (No 2)*', *op cit* n9, it was held that being single was a status for the purposes of the Convention. The judgment is looked at shortly.

⁶⁷ *Op cit*, n9.

⁶⁸ [12] (Theis J).

⁶⁹ [2] (Theis J).

⁷⁰ [2] (Theis J).

⁷¹ [6] (Theis J).

⁷² [6] (Theis J).

reasoning in *A v P (Surrogacy: Parental order: Death of Applicant)*,⁷³ that adoption would not be a satisfactory solution for a surrogacy-conceived child. Firstly, further consents would be required from the surrogate parents (s19 Adoption and Children Act 2002) or their consent would need to be dispensed with (s 20 ACA 2002).⁷⁴ Secondly, an order from the High Court would be required to authorise the placement, because the child will not have been placed for adoption by an adoption agency.⁷⁵ Thirdly, there are implications for the birth certificate and adoption register certificate that can distort the child's relationships with his / her parents.⁷⁶ Applying for an adoption order is, therefore, more onerous for the intended parent(s) than seeking a parental order. In *A v P*, Theis J reiterated again that 'no other order, or combination of orders, would have the same transformative legal effect as a parental order'⁷⁷ so it is questionable why she accepted it uncritically in *B v C*.

One possible explanation is that the parental order granted in *A v P* protected the two-parent model. By contrast, in *B v C*, which concerned single parenthood, the court settled for an adoption order instead. An adoption order does not present an adequate solution in terms of B's right to a private and family life (Article 8 ECHR) and his right to non-discrimination (Article 14 ECHR) because it distorts the reality that he is the child's biological father. It is recalled that Munby P stated in *Re X*⁷⁸ that requiring the applicant(s) to seek an adoption order instead of a parental order would create 'immense and irremediable prejudice'⁷⁹ and that adoption 'is not an attractive solution given the commissioning father's existing biological relationship with X'.⁸⁰ The adoption order in *B v C* similarly fails to recognise B's genetic relationship with his son, thus placing the parent and child in a position of 'immense and irremediable prejudice',⁸¹ as compared to a surrogacy family consisting of two parents. Instead of

⁷³ [2011] EWHC 1738 (Fam).

⁷⁴ [7] (Theis J).

⁷⁵ [7] (Theis J).

⁷⁶ [7] (Theis J).

⁷⁷ [29] (Theis J).

⁷⁸ *Re X (A Child) (Surrogacy: Time limit)*, *op cit*, n24.

⁷⁹ *Ibid*, [65] (Munby P).

⁸⁰ *Ibid*, [7] (Munby P).

⁸¹ *Ibid*, [65] (Munby P).

rewarding the thoughtful consideration B undertook before making the decision to become a single parent by choice,⁸² the HFEA 2008 punished him for not conforming to the two-parent model. In 2015, the Report of the *Surrogacy UK Working Group on Surrogacy Law Reform* called for parental orders to be extended to single parents.⁸³ This report was endorsed by Lady Warnock, which suggests that her views on parenthood have evolved since 1984.⁸⁴ The following sub-sections discuss two important judgments⁸⁵ where a single father used the ECHR to challenge the two-parent requirement in the HFEA 2008, and considers what this means for the procreative rights of single parents using surrogacy.

2.3 Is the Single Parent Exclusion Compatible with the European Convention on Human Rights?

(I) *Re Z (a Child): A Preference to the Two-Parent Model?*

‘*Re Z*’ and ‘*Z (A Child) (No 2)*’⁸⁶ concerned the right to apply for a parental order and acquire legal parenthood. In the first judgment, heard in 2015, the legal issue was whether it was open to the court to make a parental order on the application of one person, despite section 54(1) of the HFEA 2008 providing that the legislation requires a parental order to be made by two people.⁸⁷ A parental order is important because it

⁸² *B v C, op cit*, n9. B had wanted to be a father for some time and ‘waited until his circumstances were settled in terms of a job and home to enable him to provide the care a child would need. He sought advice from specialist fertility lawyers and licensed fertility clinics, to enable him to gain advice and understanding before embarking on any process of becoming a father. This is an issue that he has discussed openly with his family and close friends.’ See para [10] (Theis J).

⁸³ *Surrogacy in the UK: Myth busting and reform Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2015), p7. Available at, < <https://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf>> (last accessed 10/06/17).

⁸⁴ 1 February 2016, Horsey and Avery, ‘Meeting Lady Warnock’, *BioNews*, available at < http://www.bionews.org.uk/page_611935.asp> (last accessed 10/06/17). In the interview, Lady Warnock stated, ‘I do feel rather ashamed of the stance that I took about surrogacy ... I’m sure we could have done better.’

⁸⁵ ‘*Re Z*’ and ‘*Z (A Child) (No 2)*’, *op cit*, n9.

⁸⁶ *Ibid.*

⁸⁷ [8] (Munby P).

allows the intended parents to acquire parental responsibility and legal parenthood.⁸⁸ The parental order also fully extinguishes the parental status of the surrogate under English law.⁸⁹

The child concerned was Z, who was born in August 2014 in the State of Minnesota in the US. Z was conceived with the applicant father's sperm and a donor's egg which was implanted in an unmarried American surrogate.⁹⁰ Following Z's birth, the father obtained a declaratory judgment from the appropriate court in Minnesota, relieving the surrogate of any legal rights or responsibilities for Z and establishing the father's sole parentage of Z; following that court order he was registered as the child's father in Minnesota.⁹¹ The father returned to the UK with Z. However, under UK law the surrogate was the child's legal mother by virtue of section 33 of the HFEA 2008.⁹² The current law, which recognised the surrogate as the child's legal mother, severely undermined the procreative intentions of those involved; it had always been the surrogate's and intended father's intention for the latter to raise the child. Whatever the father's legal rights had been in Minnesota, he did not have parental responsibility for Z in the UK because he was unable to apply for a parental order as a single person.⁹³ The child's position was secured by making him a ward of court.⁹⁴

In *Re Z*, Munby P had to consider whether section 54(1) could be 'read down' in accordance with section 3(1) of the Human Rights Act 1998 to enable a single father to apply for a parental order.⁹⁵ Munby P recalled that:

‘There are only two possible routes by which the court can secure the permanent transfer in this country of parental responsibility from the surrogate mother to the father: by means of a parental order in accordance with section 54 of the 2008 Act; or

⁸⁸ *J v G*, *op cit*, n10. [27] (Theis J).

⁸⁹ *Ibid.*

⁹⁰ [2] (Munby P).

⁹¹ [2] (Munby P).

⁹² [3] (Munby P).

⁹³ [3] (Munby P).

⁹⁴ [3] (Munby P).

⁹⁵ [8] (Munby P).

by means of an adoption order in accordance with section 46 of the Adoption and Children Act 2002'.⁹⁶

It was stated that, 'for reasons that are well understood and apparent from a number of authorities ... the father would very much prefer to be able to obtain a parental order'.⁹⁷ The most persuasive reason is that a parental order, rather than an adoption order, reflects the child's 'psychological, legal and biological reality'.⁹⁸ The father argued that 'the exclusion of single parents from applying for a parental order is a discriminatory interference with a *single* person's rights to a private and family life, which is inconsistent with Articles 8 and 14 of the Convention'.⁹⁹ Article 8 ECHR sets out the right to respect for a private and family life, whilst Article 14 ECHR sets out the right to non-discrimination in respect of another Convention right. The father submitted that being single (in contrast to being one of a couple) is a 'status' within Article 14 of the ECHR.¹⁰⁰ This argument relied on analysis from *In re G (Adoption: Unmarried Couple)*.¹⁰¹ That case concerned Article 14 of the Adoption (Northern Ireland) Order 1987, which provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. Reversing the Court of Appeal's judgment, the House of Lords declared that it was unlawful for the Family Division of the High Court of Justice in Northern Ireland to reject the appellants as prospective adoptive parents on the ground only that they were not married. The House of Lords held that being unmarried was a status for the purposes of Article 14 ECHR¹⁰² and that the appellants were 'being discriminated against by being denied the eligibility that the law gives to married couples'.¹⁰³

By analogy, it is suggested that single parents by choice, who are denied the opportunity given to couples, are also discriminated against on the basis of their

⁹⁶ [3] (Munby P).

⁹⁷ [3] (Munby P).

⁹⁸ '*Re X*', *op cit*, n24. At [7] (Munby P).

⁹⁹ [18] (Munby P).

¹⁰⁰ [19] (Munby P).

¹⁰¹ [2008] UKHL 38. Also known as *Re P (A Child) (Adoption: Unmarried Couples)*.

¹⁰² [8] (Lord Hoffman).

¹⁰³ [49] (Lord Hope).

relationship status. The father argued that there was no incompatibility between the provision requiring two people to apply for an order and his convention rights, (Articles 8 and 14), because the relevant provisions in section 54 could be ‘read down’ by the court in accordance with section 3(1) of the 1998 Act.¹⁰⁴ The provision states that, ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. However, after analysing the key authority on section 3 HRA 1998, the House of Lords judgment in *Ghaidan v Godin-Mendoza*,¹⁰⁵ Munby P found that to read down the two-person requirement in a way that would be compatible with the father’s convention rights would exceed the permissible boundaries. In his view, ‘the two people requirement was a clear and prominent feature of the legislation throughout’.¹⁰⁶ He found that whilst contemporary and long-established adoption law allowed single people to adopt, ‘section 30 HFEA 1990 contained no provision for a parental order to be made in favour of one person’.¹⁰⁷

It is suggested that Munby P’s reasons for not reading down the two-person requirement are unconvincing, when viewed alongside other cases where section 54 HFEA has been interpreted flexibly. For example, in *Re DM and LK*,¹⁰⁸ a parental order was awarded notwithstanding the fact that the applicants did not live together. Following the birth, the child had been in the full-time care of her mother. DM, the father, had spent as much time as he could with LK and his daughter, but had responsibilities for his own children.¹⁰⁹ Since both LK and DM intended to live together full time, once their respective responsibilities allowed this, the court was satisfied that LK and DM were ‘two persons who are living as partners in an enduring family relationship’, thus satisfying section 54(2)(c). It was submitted on behalf of the applicants, that LK and DM have:

¹⁰⁴ [25] (Munby P).

¹⁰⁵ [2004] UKHL 30, [2004] 2 AC 55.

¹⁰⁶ [36] (Munby P).

¹⁰⁷ [13] (Munby P).

¹⁰⁸ [2016] EWHC 270 (Fam).

¹⁰⁹ [30] (Theis J).

‘been in a relationship for over 2 years, they have introduced their respective families to each other and live together as a couple as much as their respective child and work commitments permit this to happen. Their intention is to live together in the future, when their family circumstances allow...There was a brief separation in July 2015; this is explained in their statements.’¹¹⁰

Although this finding respects the diversification of family forms, including parents who do not cohabit, the underlying policy behind *LK and DM* seems to be to protect the future two-parent model. The court’s emphasis on the couple’s intention to live together suggests that a family who intends to cohabit are more deserving of a parental order than a single person who is just as committed to their child.

A preference towards the two-parent family appears again in *A and B (No 2 – Parental Order)*,¹¹¹ where Theis J made a parental order in favour of the intended parents who were married but separated. One of the intended parents had even obtained a non-molestation order against the other. Theis J held that the children had homes with each parent, and although they had separated, the parents remain married. The fact that the courts decided to award a parental order in these circumstances, indicates a preference towards a married two-parent family model, even where the adult relationship is problematic. If a parental order can be awarded to a separated couple whose relationship has involved domestic violence, then surely Munby P could have awarded the same order to the child in *Re Z*, where the CAFCASS Legal team, on behalf of the child, encouraged an order to be made. It is argued that the decision not to award the order to the single father in *Re Z* was contrary to the best interests of the child and the Parental Order Regulations 2010,¹¹² which require the court’s ‘paramount’ concern, when deciding whether to make a parental order, to be the child’s welfare.

The preference to the two-parent family, is also evidenced by the judiciary’s approach to other provisions in section 54, which have been consistently stretched, particularly following the Parental Order Regulations 2010. In *Re X (A Child) (Surrogacy: Time*

¹¹⁰ [39] (Theis J).

¹¹¹ [2015] EWHC 2080 (Fam).

¹¹² Human Fertilisation and Embryology (Parental Orders) Regulations 2010 No. 985.

Limit),¹¹³ Munby P made a parental order for a child who was almost 3 years old, notwithstanding the ‘explicit and unambiguous rule’¹¹⁴ in section 54(3) of the HFEA 2008 that ‘the applicant must apply for the order during the period of 6 months beginning with the day on which the child is born’. It was held that Parliament could not have ‘intended that the gate should be barred forever if the application for a parental order is lodged even one day late,’¹¹⁵ and it followed, that the word ‘must’ should be interpreted purposively in such a way that furthers the child’s welfare.¹¹⁶ Munby P dismissed adoption as ‘not an attractive solution given the commissioning father’s existing biological relationship with X’.¹¹⁷ McK Norrie observes that Munby P stretched the time limit condition so far that ‘it effectively leaves the provision meaningless... To hold that ‘must’ means ‘may’ means that ‘must’ means nothing at all’.¹¹⁸ Accordingly, if Munby P was able to read the 6 month time limit condition in section 54(3) in a way that rendered it ‘meaningless’, to protect the child’s welfare, then the two person requirement should also have been interpreted purposively to further the welfare of children with single parents. This creates the impression that the judiciary are willing to utilise child-welfare concerns in cases that protect the two-parent family, but not where single parents are involved.

(II) Z (A Child) (No. 2): Declaration of Incompatibility and New Developments?

In ‘*Z (A Child) (No 2)*’¹¹⁹ the father returned to the High Court, this time seeking a declaration of incompatibility in accordance with section 4 of the HRA 1998 Act. The Secretary of State conceded that there was a difference in treatment between a single person entering into a lawful surrogacy arrangement, and a couple entering the same

¹¹³ *Op cit*, n24.

¹¹⁴ K Mck Norrie, ‘English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation’, [2017] *Child and Family Law Quarterly*, Volume 29 (1), p2.

¹¹⁵ [55] (Munby P).

¹¹⁶ K Mck Norrie, *op cit*, n114, p2.

¹¹⁷ [7] (Munby P).

¹¹⁸ K Mck Norrie, *op cit*, n114, p5.

¹¹⁹ *Op cit*, n9.

arrangement, on the sole ground of the single person's relationship status,¹²⁰ which can no longer be justified within the meaning of Article 14.¹²¹ All three parties, the father, Z and the Secretary of State, invited the court to make a declaration of incompatibility pursuant to section 4(1) of the Human Rights Act 1998 (HRA) in the following terms:

‘... Sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with the rights ... under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple.’¹²²

The High Court agreed with the ‘narrow footing’ on which the Secretary of State proceeded.¹²³ The single parent exclusion was incompatible with Article 8, taken in conjunction with Article 14, and a declaration of incompatibility was made.

The disadvantage (as opposed to reading down the provision) is that ‘a declaration leaves the offending provision intact and of continuing validity’.¹²⁴ Until reforms are undertaken, single people are still unable to apply for a parental order which means their rights to Articles 8 and 14 ECHR remain compromised. In a subsequent case, *Re A (Foreign Surrogacy - Parental Responsibility)*,¹²⁵ the single intended father found himself in the exact predicament as the father in *Re Z*. He was unable to apply for a parental order because of his relationship status as a single man. The court stated that:

‘Such an order, if it were available, would provide greater legal security and stability for A, as it would extinguish the parental status and parental responsibility of the Respondent and lead to the issue of a British birth certificate, which arguably better reflects the reality of A's family situation...’¹²⁶

¹²⁰ [11] and [13].

¹²¹ [3].

¹²² [17] (Munby P).

¹²³ [23] (Munby P).

¹²⁴ See sections 3(2) (b) and 4 (6) of the HRA 1998.

¹²⁵ [2016] EWFC 70. Also known as ‘*F v S*’.

¹²⁶ [7] (Theis J).

The single father considered making an application to adopt but decided not to, given that the child was born through an international commercial surrogacy arrangement. Such an application could ‘create complications in respect of criminal restrictions in the Adoption and Children Act 2002 concerning payments (s 95 ACA 2002) and the bringing of a child into the UK for the purposes of adoption (s 83 ACA 2002)’.¹²⁷ Moreover, the single father considered it inappropriate to adopt a child who is his own biological child,¹²⁸ something previously acknowledged by Munby P in *Re X*, the case concerning the six month time limit.¹²⁹

The only option for the father to acquire parental responsibility was to apply for a Child Arrangements Order under section 12 of the Children Act 1989 (CA 1989). The court held that it was clearly in the child’s interests for the father to have parental responsibility, ‘so that he is able to take all steps that are necessary to be able to meet the day to day welfare needs of A. It also provides clarity in relation to his legal status and position in relation to A’.¹³⁰ The court granted the application having been entirely satisfied that A’s welfare needs will be met by making the Child Arrangements Order.¹³¹ However, unlike a parental order, a child arrangements order does not permanently reassign parenthood. Instead, it determines who the child is to live with, spend time or otherwise have contact,¹³² and where a child is to live, spend time or otherwise have contact with any person.¹³³ A Child Arrangements Order lasts until the child is 16,¹³⁴ or 18 where stated in the court order. Ultimately, it is no substitute for a parental order, which is the most appropriate legal order for surrogacy-conceived children.

¹²⁷ [7] (Theis J).

¹²⁸ [7] (Theis J).

¹²⁹ *Op cit*, n24. At [7] (Munby P).

¹³⁰ [8] (Theis J).

¹³¹ [9] (Theis J).

¹³² Section 8(1)(a) CA 1989.

¹³³ Section 8(1)(b) CA 1989.

¹³⁴ Section 91(10) of the Children Act 1989 states, ‘A section 8 order... shall, if it would otherwise still be in force, cease to have effect when the child reaches the age of sixteen, unless it is to have effect beyond that age by virtue of section 9(6).’

In November 2017, the Department of Health laid a remedial order in Parliament for scrutiny.¹³⁵ The Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 inserts section 54A, which allows one applicant to make a parental order. The purpose of the Remedial Order is to remedy the incompatibility of section 54 of the HFEA 2008 with Articles 8 and 14 of the ECHR. It is contended that the changes introduced by Section 54A of the Remedial Order cause further discrimination in relation to Article 8 ECHR and repeat the mistakes of the current legislative regime by focusing on adult relationships, rather than the parent's relationship with his / her child. Section 54A(2) of the Remedial Order states that at the time of the parental order application the single applicant must not be 'married or a civil partner',¹³⁶ or 'living as the partner of another person in an enduring family relationship'.¹³⁷ The single applicant can be married or in a civil partnership if the court is satisfied that 'the applicant's spouse or civil partner cannot be found',¹³⁸ 'the spouses or civil partners have separated and are living apart and the separation is likely to be permanent',¹³⁹ or by reason of physical or mental ill-health 'the applicant's spouse or civil partner is ... incapable of making an application with the applicant for an order under section 54.'¹⁴⁰ The Government has not explained why it is necessary for a single applicant to prove their separation is permanent and as such, the remedial provision risks dictating what forms of family are acceptable.

Furthermore, as noted by the Joint Committee on Human Rights, the government has not explained why a single applicant must prove they are not in an enduring family

¹³⁵ 'The Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement.' Cm 9525 (November 2017). Available at, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664161/Command_paper_Cm_9525.pdf (last accessed 19/08/18). Hereafter, 'Remedial Order'.

¹³⁶ Section 54A (2)(a) Remedial Order.

¹³⁷ Section 54A (2)(b) Remedial Order.

¹³⁸ Section 54A (3)(a) Remedial Order.

¹³⁹ Section 54A (3)(b) Remedial Order.

¹⁴⁰ Section 54A (3)(c) Remedial Order.

relationship to have their ‘biological relationship with their child legally recognised under the HFEA’.¹⁴¹ It is unclear why it is necessary to:

‘require a single parent’s partner with no biological relationship to the child (and no desire to be recognised as such a parent) to be recognised as that child’s parent merely in order for the biological parent to be recognised.’¹⁴²

Parents in an enduring family relationship may have valid reasons for not wanting both partners on the order ‘such as the fact a relationship is relatively new, or going through a rough patch’.¹⁴³ By stopping single intended parents with a biological link to their child from applying for a parental order because they happen to be in a relationship or cannot prove their separation is permanent, risks making a distinction between legitimate and illegitimate families, something the ECtHR deemed inconsistent with Article 8 ECHR many years ago in *Marckx v Belgium*.¹⁴⁴ Section 54A discriminates against surrogacy families, because the same barriers to legal recognition of the relationship between a biological parent and child would not exist for families who conceive naturally. The HFEA 2008 must break away from focusing on the parent’s relationship with other adults and start recognising and supporting the intended parent’s relationship with their child. Although section 54A seems like a positive step towards allowing single people to apply for a parental order, it is discriminatory in its current form. The HFEA 2008 should allow single people to apply for a parental order without interrogating them about whether they are ‘single enough’.

(III) Single Parenthood, IVF and Adoption: Why should Surrogacy be the ‘Odd One Out’?

The limited procreative choices of single intended parents using surrogacy is discriminatory when compared to other areas of single parenthood. When clause 54 of the Human Fertilisation and Embryology Bill was debated in the House of Commons

¹⁴¹ House of Lords and House of Commons Joint Committee on Human Rights *Proposal for a Draft Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018*, Second Report of Session 2017–19. See para 4, p3.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Marckx v Belgium* (1979) 2 EHRR 330.

on 12 June 2008, an amendment that would have allowed single parents to apply for a parental order was withdrawn. Dawn Primarolo, MP, suggested that because surrogacy is such a sensitive issue, the HFEA Bill does not extend parental orders to single people. She stated that this:

‘... recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that that places on the people who will receive the child. There is an argument, which the Government have acknowledged in the Bill, that such a responsibility is likely to be better handled by a couple than a single man or woman.’¹⁴⁵

Although surrogacy undoubtedly raises sensitive issues, no research has been carried out to support the claim that two intended parents are required to cope with the demands of surrogacy. Moreover, the government’s position is inconsistent with its position on allowing single women to access IVF. As McCandless has observed:

‘...it is hard to reconcile this with the Government’s determination not to discriminate against single-parent families, as evidenced by their earlier rejection ... that the words, ‘the child’s need for a father’ should be replaced by ‘the child’s need for a second parent’.¹⁴⁶

It is discriminatory for a single parent family to be considered an appropriate family structure in some contexts but not others, and it is unclear whether this differentiation relates to ‘uncertainty about the acceptability of surrogacy as a reproductive technique, or the creation of families with only one parent.’¹⁴⁷

On the one hand, the problem seems to be with surrogacy rather than single parenthood *per se*, especially as single parenthood is allowed in the context of IVF¹⁴⁸ and

¹⁴⁵ HC Debs, *Human Fertilisation and Embryology Bill Committee*, Col 248-249 (12 June 2008), Dawn Primarolo, <<http://www.publications.parliament.uk/pa/cm200708/cmpublic/human/080612/am/80612s02.htm>> (last accessed 02/01/17).

¹⁴⁶ J McCandless, ‘The Role of Sexual Partnership in UK Family Law: the Case of Legal Parenthood’, chapter 3, p23 in *Families- Beyond the Nuclear Ideal* (ed D Cutas and S Chan), Bloomsbury (2012).

¹⁴⁷ *Ibid*, p24.

¹⁴⁸ It is acknowledged that the supportive parenting requirement is another attempt to promote the two-parent model.

adoption. In *Re Z (A Child)*,¹⁴⁹ the single father argued that distinguishing between surrogacy and adoption based on the notion that the latter involves more complex and sensitive features is an ‘artificial, disproportionate and discriminatory interference between adoption and surrogacy’.¹⁵⁰ The ‘complex’ and ‘sensitive’ features of adoption, ‘are *not* regarded as a bar to single people adopting,’¹⁵¹ so they should not be regarded as a bar to single people using surrogacy either. It is suggested that just as many, if not more, sensitive issues arise from adoption, especially since some adopted children experience non-optimal childhood environments pre-adoption. In England and Wales, over 60% of children who go into care are looked after due to abuse and neglect.¹⁵² Although the vast majority of children who enter the public care system in the UK are afforded protection and most receive good care:

‘A significant minority experience further harm at the hands of their caregivers. Abuse and neglect arise in both residential and foster care. It may occur in any type of placement at any time...’¹⁵³

The implications of this abuse and / or neglect for these children are not barriers to single people adopting.¹⁵⁴ During the year ending 31 March 2016, 11% of adopted children (500) were adopted by single adopters.¹⁵⁵ If single people are trusted to deal with the magnitude of adopting a child who may have come from a background of abuse or neglect, then single intended parents, like the father in *B v C* who plan to have a child, should be allowed to acquire a parental order.

¹⁴⁹ [2015] EWFC 73.

¹⁵⁰ [20].

¹⁵¹ [20].

¹⁵² NSPCC, ‘Children Entering Care’, <https://www.nspcc.org.uk/preventing-abuse/child-protection-system/children-in-care/entering-care/> (last accessed 21/04/17).

¹⁵³ N Biehal, *et al.* (2014) Keeping children safe: allegations concerning the abuse or neglect of children in care: final report. London: NSPCC. Available at <<https://www.nspcc.org.uk/globalassets/documents/evaluation-of-services/keeping-children-safe-report.pdf>> (last accessed 25/04/17).

¹⁵⁴ Section 51 ACA 2002.

¹⁵⁵ Statistics available at <http://coram.baaf.org.uk/res/statengland> (last accessed 06/04/17). Note however, that the majority of children, 89% (4,190), were adopted by couples which suggests that the two-parent model is still dominant.

It is acknowledged that with adoption, single parenthood might seem more acceptable, or the ‘lesser of two evils’, because it is better to give a child a permanent stable home with a single parent, than keep them in care. By contrast, surrogacy is about planning a child that has not yet come into existence. Unlike the adoption context, there is an opportunity to promote the best possible conditions for raising that child, which is viewed by the government as a two-parent family. However, this distinction fails because the law allows single parent surrogacy arrangements to be made in the first place, but then limits opportunities to nurture that family bond and fully integrate the child with the intended parent following its birth.

In addition to the government’s differential treatment of single parenthood in adoption and surrogacy, a further artificial distinction was made with IVF. Primarolo suggested that:

‘IVF involves a woman becoming pregnant herself and giving birth to her child – there is not a direct parallel. Surrogacy, however, involves agreeing to hand over a child even before conception. The Government are still of the view that the magnitude of that means that it is best dealt with by a couple ...’¹⁵⁶

This quote reveals a worrying inference that the absence of a gestational tie between the intended parent and child, somehow means the intended parent(s) is not the child’s ‘real’ parent, and thus two parents are required to compensate for the absence of a gestational tie. Studies by Golombok, carried out when the child was one,¹⁵⁷ two¹⁵⁸ and three,¹⁵⁹ indicated that the absence of a gestational link does not affect psychological adjustment or mother-child relationships. The government’s inference

¹⁵⁶ Dawn Primarolo (MP), *op cit*, n145. At column 248.

¹⁵⁷ Golombok S, Murray C, Jadvá V, MacCallum F and Lycett E (2004b) Families created through a surrogacy arrangement: parent-child relationships in the first year of life. *Developmental Psychology* 40,400–411.

¹⁵⁸ Golombok S, MacCallum F, Murray C, Lycett E and Jadvá V (2006) Surrogacy families: parental functioning, parent-child relationships and children’s psychological development at age 2. *Journal of Child Psychology and Psychiatry* 47,213–222.

¹⁵⁹ S Golombok, C Murray, V Jadvá, E Lycett, F MacCallum and J Rust, ‘Non-genetic and non-gestational parenthood: consequences for parent–child relationships and the psychological well-being of mothers, fathers and children at age 3’, *Human Reproduction* Vol.21, No.7 pp. 1918–1924, 2006.

that one parent will not provide enough love or stability for a surrogacy-conceived child, is yet another attempt to re-inscribe the two-parent model as the *only* environment to have children. This discriminates between the Article 8 right of single parent families formed from natural reproduction, adoption and IVF (who are granted legal parenthood and / parental responsibility) and the Article 8 right of single parent families created through surrogacy, who are denied a parental order. Considering the human rights violations with the single parent exclusion, and the unjustified differential treatment between single parent surrogacy, adoption and IVF, it is suggested that policy-makers should act quickly to remove the two-person requirement from the HFEA 2008.

2.4 The ‘Enduring Family Relationship’ Requirement and the ‘Sexual Family’?

A second ‘relationship provision’ - ‘enduring family relationship’ threshold – has gone uncriticised by academic commentators and the judiciary, who have tended to focus solely on the ‘two-person’ requirement for those seeking a parental order. While *In the Matter of Z* may provide a catalyst for reforms that allow single people to apply for a parental order,¹⁶⁰ the judgment completely overlooked the ‘enduring family relationship’ requirement in section 54(2)(c) HFEA 2008. As aforementioned, on 1 December 2017, a draft remedial order was sent to Parliament to change the law on surrogacy for single parents. However, it remains extremely unclear as to whether reforms will also target the ‘enduring family relationship’ threshold. Consequently, there is a risk that even if the two-person requirement is removed, the legislation will discriminate against couples, or multiple parents, who do not meet the enduring family relationship threshold. This section intends to expose the problems with this provision for the procreative choices of less conventional surrogacy families, including those

¹⁶⁰ Since the Human Rights Act 1998 came into force on 2 October 2000, UK courts have made 29 declarations of incompatibility, of which 20 have become final’ and have not been overturned on appeal. Joint Committee on Human Rights, *Human Rights Judgments*, Seventh Report of Session 2014-15, p17, 4.1 <<http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/130.pdf>> (accessed 30/01/17).

based on co-parenting agreements, wider kinship networks, and multiple parent families.

(I) A Prioritisation of Conjuality over Care?

The ‘enduring family relationship’ requirement in section 54(2)(c) of the HFEA 2008, is not defined by statute. In *Re F and M (Children) (Thai Surrogacy) (Enduring Family Relationship)*,¹⁶¹ Russell J stated that:

‘Parliament pointedly and specifically decided not to define an enduring family relationship in terms of its longevity ... and to leave it to the High Court to test whether a couple are in an enduring family relationship.’¹⁶²

However, it is submitted that the case law has interpreted the enduring family relationship requirement in a way that requires couples to be in a sexual relationship, similar to marriage or civil partnership. This is problematic, because the value of a family should primarily reside in its caregiving functions.¹⁶³ As Wood argues, ‘it is in the state's interest to recognize and reward relationships of care, regardless of conjuality, because they help individual members of society and lessen our collective burden.’¹⁶⁴ In *Re F and M*, two intended parents made parental order applications for twins who were born in Thailand as a result of a commercial surrogacy agreement. The Parental Order Reporter (POR) expressed reservations about the relationship of the applicants and whether it was, in fact, an enduring family relationship as required by section 54(2)(c) of the HFEA 2008.¹⁶⁵ Russell J similarly stated that ‘the only real concern which can legitimately be raised in respect of the intended parent’s

¹⁶¹ *Op cit*, n33.

¹⁶² *Ibid*.

¹⁶³ Jamie R. Wood, ‘Moving beyond the Bedrooms of Our Nation: Redefining Canadian Families from the Perspective of Non-Conjugal Caregiving’, 13 *Appeal: Review of Current Law and Law Reform* 7, 13 (2008), p7.

¹⁶⁴ *Ibid*, p8.

¹⁶⁵ [1] (Russell J).

relationship is the longevity of their relationship which is presented by the word “enduring”¹⁶⁶. Nevertheless, she found that their relationship was enduring:

‘By the time of the hearing they had been in a relationship for nearly two years, had been through the treatment and conception with the respondent together and supported the respondent through pregnancy together, they have supported each other throughout her pregnancy and they have cared for F and M together as a family since the day they were born.’¹⁶⁷

It is suggested that on the face of it, this appears to constitute a liberal interpretation of ‘enduring family relationship’ because one of the parties had entered the surrogacy arrangement before meeting his partner. The length of the parent’s relationship before the conception was also quite short but, according to the POR’s welfare assessment, the children ‘are much loved and well cared for children, who demonstrated an attachment to both [P] and [B]...’.¹⁶⁸ The acknowledgement that both F and M have cared for the twins from the day they were born promises a functional interpretation of family life, which focuses on the performative aspect of care-giving rather than family structure. Nevertheless, the judgment’s repeated emphasis on the applicant’s plans to marry undermines this and demonstrates that the interpretation of ‘enduring family relationship’ is still very much characterised by a sexual partnership¹⁶⁹ or marriage-like unit.

A similar conjugal interpretation of the ‘enduring family relationship’ threshold is also evident in *Re X*.¹⁷⁰ Although the applicants were separated at the time the parental order application was issued, Munby P found that the requirement was met because the couple remained married, therefore satisfying section 54(2)(a) HFEA 2008. The question was whether the child’s ‘home’ was ‘with’ the intended parents at the time of the application, for the purposes of section 54(4)(a).¹⁷¹ Munby P held that the child

¹⁶⁶ [19] (Russell J).

¹⁶⁷ [32] (Russell J).

¹⁶⁸ [7] (Russell J).

¹⁶⁹ [15], [31] (Russell J).

¹⁷⁰ *Op cit*, n24.

¹⁷¹ [66] (Munby P).

had his ‘home’ with both the intended parents, albeit that they lived in separate houses.¹⁷² Moreover, even if this finding was not right, Munby P held that the ECHR applied and that the HFEA 2008 should be ‘read down’ to achieve a finding that the child had his home with the intended parents.¹⁷³ The judgment referred to *Kroon v The Netherlands*,¹⁷⁴ where the Strasbourg court accepted that family life existed between two parents and their children, even though the parents had never married, did not cohabit and lived in separate houses. Accordingly, he held in the case before him, that there was family life within the meaning of Article 8 between the intended parents and the child.¹⁷⁵ *Re X* demonstrates how the judiciary are prepared to stretch certain aspects of section 54, in this case the ‘home’ requirement, to do justice to the married two-parent family. The applicants had separated, so finding that they satisfied the statutory provision, because they were technically ‘married’, still places marriage and the two-parent structure at the heart of the ‘enduring family relationship’ test. In *Re Z*, Munby P could have referred to the Strasbourg jurisprudence he relied on in *Re X*, such as *Marckx v Belgium*¹⁷⁶ where family life was found to exist between a child and his unmarried mother. However, he insisted that the two-person requirement could not be read down.

The court’s definition of the ‘enduring family relationship’ in these cases, suggests that the couple at the heart of the family remains a sexual one. It is argued that legislation needs to confront the definition of ‘enduring family relationship’ and develop it beyond the two narrow conjugal situations in *Re X* and *Re F and M* where the parties were: (1) separated but *still* married, and (2) intended to marry.

(II) Recognising the Choices of Platonic Co-Parents

The current interpretation of ‘enduring family relationship’ raises concerns for less conventional groups of parents, who have a shared desire to parent but are not in a sexual ‘relationship’ or living together as partners. Co-parenting has become more

¹⁷² [67] (Munby P).

¹⁷³ [68] (Munby P).

¹⁷⁴ (1994) 19 EHRR 263, [1995] 2 FC 28.

¹⁷⁵ [68] (Munby P).

¹⁷⁶ *Op cit*, n144.

popular in recent years and is used by same-sex couples and heterosexual men and women who have not met a partner and would rather co-parent than miss the opportunity of parenthood completely.¹⁷⁷ According to Jadvá *et al*:

‘Elective co-parenting is a relatively new phenomenon, whereby a man and a woman who are not married, cohabiting or involved in a sexual relationship with each other have a child together and typically raise the child in separate households’.¹⁷⁸

With the increasing use of ARTs and the role of the internet, a growing number of people seek co-parenting arrangements to have children, ‘in order for both biological parents to be involved in the child’s upbringing’.¹⁷⁹ Until Jadvá *et al*’s study, which looked at co-parents using the website ‘Pride Angel’, selective co-parenting had been principally associated with the gay and lesbian community. In 2013, the Guardian reported a story about co-parenting which involved two people who decided to have a child together despite not being in a sexual or romantic relationship.¹⁸⁰ Sabrina was a single gay woman and Kam was a gay man in a same-sex relationship. Kam and Sabrina, the child’s biological parents, found each other on the internet with the sole intention of having a child. However, Jadvá *et al*’s study shows that, ‘with the rise of co-parenting websites, increasing numbers of heterosexual men and women are seeking these types of parenting arrangements’.¹⁸¹ Approximately one-third of men and one half of women seeking co-parenting arrangements were heterosexual and the majority (68%) were single.¹⁸²

If two adults met online and decided to enter into a surrogacy arrangement and co-parent as a platonic couple, it is unlikely they would be able to apply for a parental order because of the court’s conjugal interpretation of ‘enduring family relationship’.

¹⁷⁷ V Jadvá, T Freeman, E Tranfield and S Golombok, ‘“Friendly allies in raising a child”: a survey of men and women seeking elective co-parenting arrangements via an online connection website’, *Human Reproduction*. Vol. 30, No. 8 pp.1896–1906, 2015. At p1987.

¹⁷⁸ *Ibid*, p1987.

¹⁷⁹ *Ibid*, p1899.

¹⁸⁰ The Guardian (15th December 2013) Louise Carpenter, ‘Meet the Co-Parents’. <https://www.theguardian.com/lifeandstyle/2013/dec/15/meet-the-co-parents-modern-families> (accessed 12/06/17).

¹⁸¹ V Jadvá *et al.*, *op cit*, n177, p1896.

¹⁸² *Ibid*, p1896.

A platonic couple would not be able to satisfy the factors in *Re F and M*, where the applicants lived together and planned to marry. When 53 participants (30 men and 23 women) in Jadvá's study provided responses to the open-ended question, 'Please describe how you see your relationship with the co-parent', the most common terms used related to friendship.¹⁸³ Given the two-parent model that underpins the HFEA 2008, it is unlikely that the courts would interpret 'friendship' as satisfying section 54(2)(c) HFEA 2008.

Contrary to the conjugal interpretation of 'enduring family life' in *Re F and M* and *Re X*, the ECtHR's interpretation of Article 8 ECHR indicates that two adults who are not in an 'enduring family relationship' might have 'family life' because factors such as co-habiting are unnecessary. This is evident with the ECtHR's extension of Article 8 protection to unmarried parents in *Inze v Austria*,¹⁸⁴ where the European Court held that 'very weighty reasons would have to be advanced before a difference of treatment on the ground of birth out of wedlock could be regarded as compatible with the Convention.'¹⁸⁵ Equally, in *Marckx*¹⁸⁶ the Belgian Parliament was found to be in violation of Article 8 by refusing to establish the same automatic legal affiliation between an unmarried mother and her child as they did for a married mother and her child. In *Berrehab*¹⁸⁷ the right to private and family life was held not to 'presuppose permanent cohabitation'.¹⁸⁸ Subsequently in *Keegan v Ireland*,¹⁸⁹ the Court held that family life is not confined to marriage-based relationships and 'there thus exists between the child and the parents a bond amounting to family life even if at the time of the child's birth the parents are no longer co-habiting or if their relationship has then ended'.¹⁹⁰ Nevertheless, as Stalford has observed:

¹⁸³ *Ibid*, p1903.

¹⁸⁴ *Inze v Austria*, ECHR, Judgement 28 October 1987, Series A, 126.

¹⁸⁵ *Ibid*, at 41.

¹⁸⁶ *Op cit*, n144.

¹⁸⁷ *Berrehab and Koster v The Netherlands* (1989) 11 EHRR 322.

¹⁸⁸ *Ibid*, [21].

¹⁸⁹ 18 EHRR 342 1994.

¹⁹⁰ *Ibid*. See also *Kroon and Others v. the Netherlands* Application number 00018535/91 October 27, 1994, para 30.

‘...that is not to say however, that the ECHR represents the ‘gold standard’ in its approach to and interpretation of families and family life. Indeed, there is an abundant academic literature criticizing the limitations of the ECHR which, it is claimed, is still predicated on the nuclear, married, heterosexual ideal’.¹⁹¹

For example, in *Khan v UK*¹⁹² the ECtHR confirmed that other factors that could constitute family life for the purpose of Article 8, include ‘the nature and duration of the parents’ relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child’s care and upbringing; and the quality and regularity of contact.’¹⁹³ It found that family life arose between the applicant and his baby daughter because despite not residing with her, he had regular contact with the child. Nevertheless, the factors in *Khan* suggest that some kind of relationship must have initially existed between the parties for family life to arise. As such, the ECtHR must also move away from a conjugal interpretation of family life to reflect the different types of family structures that now exist.

Returning to the HFEA 2008, the judiciary’s conjugal interpretation of ‘enduring family relationship’ denies other diverse family relationships from acquiring a parental order. For instance, there is no reason why a single man who has a child through surrogacy, should not be allowed to apply for a parental order alongside his mother (the child’s grandmother) as in *B v C*.¹⁹⁴ These kinds of collaborative parenting structures already occur in the context of natural reproduction:

‘[F]or example, where a mother and father raise a child with their own daughter, who has become pregnant at a young age while still living at home. Many would see this as the ideal arrangement in which a teenage mother might raise her child and certainly

¹⁹¹ H Stalford, ‘Concepts of Family Under EU Law – Lessons from the ECHR’ *International Journal of Law, Policy and the Family* 16, (2002), 410–434, p420.

¹⁹² (2010) 50 EHRR 47.

¹⁹³ *Ibid*, [34].

¹⁹⁴ *Op cit*, n9.

would not see anything wrong in her own parents taking on a substantial parenting role with respect to the new baby.’¹⁹⁵

Single parents who enter into a surrogacy arrangement and have a very supportive mother and father, or other relatives, might have more of an ‘enduring family relationship’ than many intended parents who satisfy section 54(2)(c) HFEA 2008. In the aforementioned case of *B v C*, the single father, Mr Casson, had the support of his mother, who had acted as the surrogate. Theis J praised the ‘close relationships within this family’ which would help ensure the child’s ‘lifelong welfare needs are met’.¹⁹⁶ As a result of his mother’s support, the single father was able to return to work after his son’s birth, while his mother helped out with childcare duties.¹⁹⁷ It is argued that the support provided by the surrogate to her son, and grandson, amounts to just as much of an ‘enduring family relationship’ as the one found in *Re F and M*. The ‘enduring family relationship’ provision should have been based on factors such as commitment to the child and the quality of relationships. This would have encompassed co-parents who have a shared desire to parent, and single intended parents who enter into an arrangement with the support of a family member.

The more recent case of *X (A Child - foreign surrogacy)*¹⁹⁸ raises new questions for the ability of platonic co-parents to apply for a parental order following surrogacy. In the case, only two of the parental order requirements in section 54 HFEA 2008 gave rise ‘to the slightest query’.¹⁹⁹ The first was section 54(2)(a) which provides that the applicants must be husband and wife. The applicants were married but one of them is, ‘as the other has always known, gay, and their relationship and marriage is thus ... platonic and not romantic’.²⁰⁰ Munby P held that this did not in any way affect their ability to satisfy the requirement of marriage because a sexual relationship is

¹⁹⁵ J McCandless and S Sheldon, ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’, (2010) 73(2) *Modern Law Review*, 175-207, p 198.

¹⁹⁶ [37] (Theis J).

¹⁹⁷ The Guardian 7th March 2015, ‘Mother tells of giving birth to gay son's baby after surrogate pregnancy’, available at < <http://www.telegraph.co.uk/news/health/news/11456392/Mother-tells-of-giving-birth-to-gay-sons-baby-after-surrogate-pregnancy.html> > (last accessed 27/11/17).

¹⁹⁸ [2018] EWFC 15.

¹⁹⁹ [5] (Munby P).

²⁰⁰ [6] (Munby P).

unnecessary.²⁰¹ Section 54(4)(a) provides that ‘at the time of the application and the making of the order ... the child’s home must be with the applicants.’ In this case the intended parents had different homes and the child’s time was split between them; this clearly established that the child’s home was with the applicants.²⁰² Munby P did not have any doubt that he should make the parental order which was ‘so manifestly in the best interests of the child’.²⁰³

Despite the happy outcome of the case, it raises uncertainties for platonic intended parents. Friends who decide to co-parent may view the case as opening the door for co-parents to apply for a parental order. Especially as Munby P states that relationships are ‘no concern of the judges or of the State’ and that ‘we should not make windows into people’s souls.’²⁰⁴ However, it is suggested that the case does not create a new opportunity for platonic couples / friends to apply for a parental order. If the couple in *X (A Child – foreign surrogacy)* were unmarried, the outcome would have been different. Their relationship would have been the business of the judges because the relationships of single parents and unmarried couples have been subject to scrutiny.²⁰⁵ It is only by virtue of the couple’s *married* status that they were able to apply for a parental order. Platonic co-parents who are unmarried would need to rely on the ‘enduring family relationship’ threshold which still requires a sexual component.

It is suggested that the ‘enduring family relationship’ threshold should be removed from the HFEA 2008. If the government decides to remove the two-person requirement, but leaves the ‘enduring family relationship’ threshold for couples intact, platonic co-parents could be encouraged to choose one parent to apply for a parental order as a single person, (or enter a platonic marriage).²⁰⁶ This would not reflect the intentions of co-parents who want to *share* the responsibilities of raising a child without being in a sexual relationship or marriage. This could lead to unfair

²⁰¹ [8] (Munby P).

²⁰² [9] (Munby P).

²⁰³ [3] (Munby P).

²⁰⁴ [7] (Munby P).

²⁰⁵ For example, the couple in *Re F & M*, *op cit*, n33.

²⁰⁶ See *X (A Child - foreign surrogacy)*, *op cit*, n198.

consequences for procreative rights; one co-parent would have more rights than the other, as the parental order would be in their sole name. This could also result in the child being confused about the identity of his / her parents. Thus, policy-makers should remove all the relationship provisions, to avoid these problems.²⁰⁷

2.5 Moving from Form to Function: A New Definition of Parenthood?

The ‘relationship provisions’ within section 54 HFEA 2008 fail to support the variety of family structures created through surrogacy. Single parents, co-parents, and other relationships of kin are involved in creating and parenting surrogacy-conceived children. Given the human rights issues with the ‘relationship provisions’, surrogacy regulation needs to extend parental orders beyond the ‘sexual family’. Although an imperfect solution,²⁰⁸ it is suggested that the relationship provisions should be replaced with a functional definition of parenthood. This approach focuses on the way a relationship functions, rather than its legal form.²⁰⁹ In 2001, The Law Commission of Canada published a Report, *Beyond Conjugalality*,²¹⁰ which challenged the centrality of the ‘conjugal family’ in legal policy. The Law Commission asked whether it could ‘imagine a legislative regime that accomplishes its goals more effectively by relying less on whether people are living in particular kinds of relationships?’²¹¹ Amongst its recommendations, the Law Commission suggested that:

‘The government should review all of their laws and policies that employ relational terms to determine whether the relationships are relevant to, or an effective means of accomplishing, each law’s objectives’.²¹²

²⁰⁷ Chapter 5 considers how legal parenthood should be assigned in the surrogacy context.

²⁰⁸ J Herring, ‘Making family law more careful’, chapter 3 in *Vulnerabilities, Care and Family Law* (Routledge, 2014) edited by J Wallbank and J Herring. Herring recognises that a functional approach to family law may be dangerous because ‘it is easy to assume what functions family law has and from that form a particular image of the family’ (p52).

²⁰⁹ J Millbank, ‘The role of ‘functional family’ in same-sex family recognition trends’, (2008) 20 *Child and Family Law Quarterly*, pp155-182, p155.

²¹⁰ Law Commission of Canada, *Beyond Conjugalality: Recognising and supporting close personal adult relationships* (LC, 2001), available at <https://www.samesexmarriage.ca/docs/beyond_conjugalality.pdf> (last accessed 17/10/17).

²¹¹ *Ibid.*, chapter 3, p29.

²¹² *Ibid.*, p32 and p141.

In light of the declaration of incompatibility and period of law reform, the UK government is urged to re-evaluate section 54 HFEA 2008 and ask whether measuring 'enduring family relationships' by conjugality is relevant to the best interests and welfare of the child. It should also ask itself whether requiring intended parents to be married or in a civil partnership is relevant, and whether section 54A, which demands evidence of the intended parent's single status, achieves the aim of a parental order, which is to provide life-long security to the child and their parents.

There is much appeal with the alternative functional approach, which was discussed in the Canadian judgment, *Canada (Attorney General) v Mossop*.²¹³ L'Heureux Dube J commented that the functional approach:

'...[O]ffers distinct advantages over a more formalistic approach which systematically excludes all but a specific form of relationship. Further, it provides an objective yet flexible standard, which allows for a more accurate recognition of a greater number of family groupings which share characteristics which are thought to be essential in specific contexts....'²¹⁴

The functional approach embodies the idea that 'the role of law is not to "channel" people into certain accepted family forms',²¹⁵ such as a two-parent family, 'but rather to reflect and support a diverse range of relationships'.²¹⁶ A functional definition of parenthood also rests on a 'performative aspect' in which the parties are granted rights (e.g. legal parenthood) because of 'what they *do* in relation to one another, not because of the *status* of who they *are* or what manner of legal formality they have undertaken.'²¹⁷ One specific definition of parenthood presented by Minow, includes people who have 'taken care of the child on a daily basis, is known to the child as a parent, and has provided love and financial support'.²¹⁸ This functional definition of

²¹³ [1993] 1 SCR 554.

²¹⁴ *Ibid*, 638-39.

²¹⁵ See J Millbank, *op cit*, n209, p182.; and C Schneider, 'The Channelling Function in Family Law' (1992) 20 *Hofstra Law Review* 495, at p498.

²¹⁶ *Ibid*, J Millbank, p182.

²¹⁷ J Millbank, 'The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family', (2008) 22 *International Journal of Law, Policy and Family*, 150.

²¹⁸ Martha Minow, 'Redefining Families: Who's In and Who's Out', 62 *University of Colorado Law Review*. 269 (1991). P278.

parenthood focuses on what Fineman calls the ‘contingencies of care-giving’ rather than tying parenthood to adult relationships. If adopted by the HFEA 2008, the ‘non-sexual family’ would finally be valued by UK surrogacy legislation and placed on an equal footing with the ‘sexual family’.

Although Minow favours a functional definition of families, she worries that the government might assign family-like status ‘in order to punish people or deny them benefits for which they would otherwise be eligible’.²¹⁹ She says, there ‘is an important difference between the expanded family chosen by its participants and the expanded family used by the government to achieve its own ends.’²²⁰ It is acknowledged that a functional approach to defining adult relationships could be used by the government for its own ends.²²¹ However, in the specific context of replacing the relationship provisions in section 54 HFEA, this is less of a concern because the family is expanded by its own participants. Rather than legal parenthood being imposed by the legislation, the intended parent(s) (whether they are single, co-parents, friends or family members) would assign the role of legal parenthood to themselves by choosing to apply for a parental order.

It is acknowledged that the replacement of the ‘relationship provisions’ with a functional approach to parenthood and families, will invoke a broader debate about the role of family law. Policy-makers will need to reflect, not just on the HFEA’s ‘relationship provisions’ in section 54 but on all other policies which tie parenthood to relationship status. This is an ambitious task which could call into question the very foundation of family law. Nevertheless, a realistic starting point would be to remove the relationship provisions from the HFEA 2008 so that a diverse range of surrogacy families can apply for parental order. It will be argued in chapter 5 that the new gateway criteria for applying for a parental order, in addition to section 54(2) -(8),²²²

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Glennon has criticised the Canadian Law Commission’s Report because ‘the attempt to displace, or be seen to displace, the centrality of conjugal partners in legal policy could be viewed as a subtle strategy to undermine the significance of same-sex partnership recognition’. See L Glennon, ‘Displacing the Conjugal Family in Legal Policy - A Progressive Move’, 17. *Child and Family Law Quarterly* 141, 164 (2005), p 156.

²²² Criticism of the other parental order provisions is saved for subsequent chapters.

should be intention; a forward-looking concept that focuses on who intends to perform the day-to-day care taking role.²²³

The functional approach does not need to be an aspirational concept. In Canada, Natasha Bakht and Lynda Collins were best friends who successfully fought a two-year legal battle to be officially recognised as co-parents to Natasha's disabled son.²²⁴ This was the first time in Canadian history that two people who have never been in a romantic relationship have been legally recognised as parents. The co-parents sought an order that would secure the child's existing relationship with the child's non-biological mother, Lynda, and ensure she had equal footing alongside Natasha. The friends found that Elaan's best interests were 'met through a combination of support from his biological mother, his non-biological mother, extended family, privately-funded care, and state support...'.²²⁵ As Bakht and Collins recognise, 'this is not to say that non-conjugal co-parenting units are superior to their more traditional counterparts'²²⁶ or single parent families. Instead, the point being made is that 'there is no limit to the configurations of relationships that can support the healthy raising of children'.²²⁷ A functional approach to parenthood in section 54 HFEA 2008 would allow people to organise their own families and give single people, multiple parents, platonic co-parents and other kin relationships, the opportunity to apply for a parental order. A functional approach to defining intended parents for the purpose of section 54 HFEA 2008, would recognise the single fathers in *B v C* and *In the Matter of Z*, as the legal fathers of their children because of the day to day caring role they have performed since their children were born. Their status as single people is irrelevant to these care-giving functions. If this approach was adopted by the HFEA 2008, UK

²²³ This will usually be the intended parents.

²²⁴ BBC News, 22nd March 2017, 'Best friends become first to co-parent in Canada', available at <<http://www.bbc.co.uk/news/av/39343045/best-friends-become-first-to-co-parent-in-canada>> (last accessed 30/07/17).

²²⁵ Natasha Bakht & Lynda Collins, "Are you my Mother? Parentage in a Non-Conjugal Family" (2018) 31:1 *Canadian Journal of Family Law* (Forthcoming). Available at SSRN: <https://ssrn.com/abstract=3060037>.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

surrogacy regulation would finally accommodate the rights of single and platonic intended parents and give greater respect to Article 8 ECHR.²²⁸

2.6 Conclusion

The arguments presented in this chapter support a more inclusive legal conception of parenthood than is currently assigned by the HFEA 2008. Single parents are allowed to use surrogacy, so it is illogical that the legislation does not follow this through and allow this group of parents to apply for a parental order. The recent judgment in *Z (A Child) (No 2)* confirms that the exclusion of single parents from applying for a parental order, is contrary to Articles 8 and 14 of the ECHR, and therefore discriminates against the procreative decisions of single people. By analogy, it is argued that the ‘enduring family relationship’ threshold similarly violates the same Convention rights because it prevents co-parents and wider kin relationships from applying for a parental order. This chapter suggested that the relationship provisions are examples of what McCandless and Sheldon call the ‘tenacity of the sexual family form’.²²⁹ This is no longer satisfactory given the diverse types of families created by ARTs and surrogacy.

In light of the human rights violations created by the ‘relationship provisions’, they should be removed from the HFEA 2008 to allow single people, co-parents and couples alike to apply for a parental order. This would better respect the ‘actual contingencies of care-taking relationships’ between parents and their children and move away from regulation that focuses on relationship status and structure.²³⁰ The following chapter considers whether the removal of the relationship provisions is also necessary to protect the rights of surrogacy-conceived children whose parents do not fit neatly into the ‘two-parent’ model.

²²⁸ Chapter 5 questions if a functional approach is still workable if the intended parents were to be assigned legal parenthood upon the child’s birth.

²²⁹ *Op cit*, n195.

²³⁰ The basis upon which a parental order should be awarded is discussed in chapter 5.

3. Exploring the Children's Rights Implications of the HFEA 2008's 'Relationship Provisions': What About Children without Two Parents?

3.1 Introduction

This chapter continues to explore the problematic 'relationship provisions' in section 54 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008), including the two-person requirement¹ and the 'enduring family relationship'² threshold. The United Nations Convention on the Rights of the Child (CRC), the European Convention on Human Rights (ECHR), and the 'Parental Orders Regulations 2010',³ are used to consider the implications of the 'relationship provisions' for the rights of the child. In 2002 Jackson stated that it is:

‘...worth drawing attention to privacy’s uneven distribution within society: some people’s domestic arrangements have always been more private than others. Single parents, for example, have often been subjected to public scrutiny and criticism, at times again justified by concern for the ‘best interests of the child’.⁴

This ‘uneven distribution’⁵ is evident within UK surrogacy regulation, which excludes single people and those not in an ‘enduring family relationship’ from applying for a

¹ Section 54(1) HFEA 2008.

² Section 54 (2)(c) HFEA 2008.

³The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985) imports into section 54 applications the provisions of section 1 of the Adoption and Children Act 2002 (ACA 2002).

⁴ E Jackson, ‘Conception and the Irrelevance of the Welfare Principle’, *Modern Law Review*, 2002,65(2) pp176-203, p186. See also, E Jackson, ‘Fractured Values: Law, Ideology and the Family’ (1997) 17 *Studies in Law, Politics and Society* 99.

⁵ *Ibid.*

parental order on the basis that it is in the ‘best interests’ of surrogacy-born children to have two parents.⁶

This chapter uses the central tenets of a children’s rights-based approach,⁷ to assess: (1) whether the government’s exclusion of single parents from parental order applications is in the ‘best interests’ of children without two parents, (2) whether the judiciary have adopted a children’s rights-based approach in cases involving the ‘relationship provisions’, and (3) what (children’s) rights are affected by the ‘relationship provisions’. It is important to use a child rights-based approach because:

‘It can help to increase the visibility of children within the law by ensuring that their status as rights-holders is recognised, that their voices are heard and that their interests are identified and factored into judicial decision-making.’⁸

Hollingsworth and Stalford’s indicators of a child rights-based approach⁹ and Tobin’s substantive approach¹⁰ to children’s rights, were intended to be used to assess the judicial methodology in cases concerning children. This chapter uses the approaches to reflect not only upon the judiciary’s treatment of children’s rights in relation to the relationship provisions, but also the government’s methodology for excluding single parent families from section 54 of the HFEA 2008.

The chapter proceeds in three sections. The first scrutinises the UK government’s assertion that surrogacy-conceived children require two parents who are in an ‘enduring family relationship’.¹¹ It is questioned whether the government’s decision

⁶ Dawn Primarolo (MP), HC Debs, col 248-249, 12 June 2008. Available at, <https://publications.parliament.uk/pa/cm200708/cmpublic/human/080612/am/80612s02.htm> (last accessed 17/10/17).

⁷ Including, J Tobin, ‘Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?’ (2009) 33 *Melbourne University Law Review* 579; U Kilkelly, ‘The best of both worlds for children’s rights: Interpreting the European Convention on Human Rights in the light of the UN Convention on the Rights of the Child’. (2001) *Human Rights Quarterly*, 23, pp 308–326; and K Hollingsworth and H Stalford, ‘Towards Children’s Rights Judgments’, chapter 3, in *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice*, edited by H Stalford, K Hollingsworth and S Gilmore, 2017 (Hart Publishing, 1st ed).

⁸ *Ibid*, K Hollingsworth and H Stalford, p53.

⁹ *Ibid*.

¹⁰ *Op cit*, n7, J Tobin.

¹¹ Section 54(2)(c) HFEA 2008.

to exclude families who do not conform to the two-parent model protects the best interests of children without two parents. Drawing upon Article 3 CRC, *General Comment No. 14* of the Committee on the Rights of the Child,¹² and academic commentary,¹³ the first section explores the concept of ‘best interests’. It uses these understandings to evaluate whether the government’s insistence on a two-parent model during the HFE Bill 2008 has undermined Article 3 (1) CRC, which ‘gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere’.¹⁴

The second section of the chapter uses Tobin’s spectrum of rights-approaches, and other indicators of a children’s rights approach,¹⁵ to evaluate how the English judiciary responded to the two-parent requirement in *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*,¹⁶ and *In the Matter of Z (A Child) (No. 2)*.¹⁷ The exclusion of the ‘enduring family relationship’ threshold from the judgment, despite the provision having serious implications for the rights of children with less conventional parents, is also critiqued. It is important to evaluate the judiciary’s response to the ‘relationship provisions’ because until legislative reforms are undertaken, single intended parents are reliant upon the courts to interpret the provisions creatively.

The final section considers how the ‘relationship provisions’, which deny children with less conventional families a parental order, affect the child’s right to identity, which is inherent in Articles 7 and 8 CRC. The judiciary’s response has been to bypass

¹² *General comment No. 14* (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (last accessed 20/08/18).

¹³ M Freeman, ‘Article 3: the Best Interests of the Child’ in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde and B Abramson (eds), *Commentary on the United Nations Convention on the Rights of the Child* (Leiden, Brill Nijhoff, 2007).

¹⁴ *General Comment No. 14*, *op cit*, n12. Para 1, p3.

¹⁵ *Op cit*, n7.

¹⁶ [2015] EWFC 73. Hereafter, ‘*Re Z*’.

¹⁷ [2016] EWHC 1191 (Fam). Hereafter, ‘*Z (A Child) (No. 2)*’.

the problems with the two-person requirement and award an adoption order,¹⁸ child arrangements order¹⁹ or wardship²⁰ instead. It is asked whether these are adequate solutions for the best interests of the surrogacy-conceived child, including the child's genetic identity, the psychological relationship with their parent, and their 'identity of origin.'²¹

3.2 Is there a Children's Rights Justification for the Two-Parent Model in Section 54 HFEA 2008?

(I) Parental Orders and the Best Interests of the Child

The best interests principle in Article 3 (1) CRC provides that:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

As noted by the Committee on the Rights of the Child in its *General Comment No. 14*,²² the concept of the child's 'best interests' is not new, and in fact pre-dates the CRC.²³ It was already enshrined in the 1959 Declaration of the Rights of the Child,²⁴ the Convention on the Elimination of All Forms of Discrimination against Women,²⁵ as well as national and international laws.²⁶ The child's 'best interests' in Article 3 (1) CRC, has been described as 'pivotal to the whole of the Convention'²⁷ because it 'lays

¹⁸ See *B v C* (Surrogacy - Adoption) [2015] EWFC 17. Hereafter '*B v C*'.

¹⁹ See *Re Z* (surrogacy agreements) (Child arrangement orders) [2016] EWFC 34; and *Re A* (Foreign Surrogacy- Parental Responsibility) [2016] EWFC 70, hereafter '*Re A*'.

²⁰ See *M v F & SM* (Human Fertilisation and Embryology Act 2008) [2017] EWHC 2176 (Fam).

²¹ B Bennett Woodhouse "'Are you my Mother?': Conceptualizing Children's Identity Rights in Transracial Adoptions', 2 *Duke Journal of Gender Law and Policy* 107 1995, p 111.

²² *Op cit*, n12.

²³ *Ibid*, para 2, p3.

²⁴ Para 2.

²⁵ Articles 5 (b) and 16, para. 1 (d)).

²⁶ *General Comment, No. 14*, *op cit*, n12. Para 2, p3.

²⁷ M Freeman, *op cit*, n13, p25.

down the general standard which underpins the rights set out in subsequent articles'.²⁸ The CRC explicitly refers to the child's best interests in other articles including Article 9 (separation from parents), Article 10 (family reunification), Article 18 (parental responsibilities) and Article 20 (deprivation of family environment and alternative care). Reference is also made to the child's best interests in the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography (preamble and Article 8).

According to *General Comment No. 14*, the concept of the child's best interests is 'aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child'.²⁹ The Committee expects States to interpret 'development' as a 'holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'.³⁰ *General Comment No. 14* also states that 'an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'.³¹ Moreover, there is no hierarchy of rights in the CRC and instead, 'all the rights provided for therein are in the "child's best interests"'.³²

According to *General Comment No. 14*, the child's best interests can be interpreted as a threefold concept. Firstly, it is a substantive right. The child has a right to have his or her best interests assessed and taken as a primary consideration when different interests are being considered, in order to reach a decision on the issue at stake.³³ Secondly, 'best interests' is a fundamental, interpretative legal principle; 'If a legal provision is open to more than one interpretation, the interpretation which most

²⁸ *Ibid.*

²⁹ *Op cit*, n12, para 4, p5.

³⁰ UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 12, available at: <http://www.refworld.org/docid/4538834f11.html> [accessed 22 August 2018]

³¹ *Op cit*, n12, para 4, p5.

³² *Ibid.*

³³ *Ibid*, para 6 (a), p4.

effectively serves the child's best interests should be chosen'.³⁴ Finally, it is a rule of procedure:

'Whenever a decision is to be made that will affect a specific child, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned...'³⁵

The CRC does not define 'best interests', and Freeman suggests that it is best to view the concept as 'indeterminate'³⁶ because different societies and historical periods will disagree. For some, best interests 'can be reduced to a satisfaction of material needs. Poverty or homelessness is clearly not in a child's best interests'.³⁷ Others, however, focus on 'emotional security, psychological well-being, attention to developmental interest.'³⁸

The judiciary have consistently explained the importance of a parental order for the 'lifelong welfare' and 'best interests' of a surrogacy-conceived child. In *Re X (A Child: Surrogacy Time Limit)*,³⁹ Munby P proclaimed that a parental order provides the child with the 'optimum legal and psychological solution'.⁴⁰ In *J v G*⁴¹ Theis J also acknowledged that a parental order is capable of safeguarding the children's welfare on a lifelong basis because it confers 'joint and equal legal parenthood and parental responsibility upon both the applicants' and fully extinguishes the parental status of the surrogate under English law.⁴² In *CC v DD*,⁴³ Theis J reiterated that it was clear that a surrogacy-conceived child's:

³⁴ *Ibid*, para 6 (b), p4.

³⁵ *Ibid*, para 6 (c), p4.

³⁶ M Freeman, *op cit*, n13, p27.

³⁷ *Ibid*, p27.

³⁸ *Ibid*, p27.

³⁹ [2014] EWHC 3135 (Fam). Hereafter '*Re X*'.

⁴⁰ *Ibid*, [7] (Munby P).

⁴¹ [2013] EWHC 1432 (Fam),

⁴² *Ibid*, [27] (Theis J).

⁴³ [2014] EWHC 1307 (Fam).

‘Lifelong welfare can only be met by securing his relationship with both of the applicants in a lifelong way that will give them equal status that will endure for the rest of their lives. The only order that is capable of doing that is a parental order.’⁴⁴

Even prior to the Parental Order Regulations 2010, the judiciary acknowledged how important a parental order was for the lifelong welfare of the surrogacy-born child. In *X and Y (Foreign Surrogacy)*⁴⁵ Hedley J noted how the effect of a parental order is to confer status for life and that it ‘is difficult to see how applying any principle other than welfare with a ‘lifelong’ perspective would be apt in deciding’⁴⁶ the application. The judiciary, who are at the forefront of deciding parental order applications, have persistently held that the parental order creates the best result for a surrogacy-conceived child, one which promotes their best interests and lifelong welfare.

The government’s decision during the HFE Bill 2008 to exclude single parents and their children from acquiring a parental order is not only inconsistent with the judiciary’s view on parental orders, but also violates Article 3 CRC. As aforementioned, legislative bodies should have the best interests of the child as its primary consideration when making decisions that concern children. However, when the decision was made to retain the two-person requirement- a decision that affects a surrogacy-conceived child without two parents – the government did not evaluate the possible impact (positive or negative) of the decision for this group of children,⁴⁷ or consider how the provision affects the child’s best interests. Instead, while debating the HFE Bill 2008, the government made a general assertion that the responsibilities of surrogacy are better handled by two people, rather than one:

‘The Bill does not extend parental orders to single people... There is an argument, which the Government have acknowledged in the Bill, that such a responsibility is likely to be better handled by a couple than a single man or woman.’⁴⁸

⁴⁴ [43] (Theis J),

⁴⁵[2008] EWHC 3030 (Fam). Hereafter ‘*X & Y*’.

⁴⁶ [25] (Hedley J).

⁴⁷*Op cit*, n12, para 6 (c), p4.

⁴⁸ Primarolo (MP), *op cit*, n6, column 248.

This does not explain how it is in the ‘best interests’ of children (with single parents) to be left without a parental order. It is suggested that child welfare assumptions relating to single parenthood were used in a paternalistic way by the government to promote what Fineman defines as the ‘sexual family’.⁴⁹ The government did not discuss the rights of the child at all during its discussions on the two-person requirement. The provision ignores the reality that single parents can, and do, enter surrogacy arrangements all the time.⁵⁰ UK law does nothing to prevent single people having a child through surrogacy, so it is inconsistent that the HFEA 2008 should punish the children of single people once they have been born by denying them an order that is vital for their welfare.

In the context of children’s rights judgments, Hollingsworth and Stalford argue that ‘in certain circumstances judges should be informed by wider empirical evidence about children.’⁵¹ This is invaluable in certain contexts including where ‘robust, empirically verified insights are needed to counter the dominance of strong political and economic factors’.⁵² There is evidence to suggest that children conceived via surrogacy and other ARTs fare just as well with single parents by choice⁵³ and this should have been used during the HFE Bill 2008 to ‘counter the dominance’⁵⁴ of the two-parent ideal. It is suggested that it is not just the judiciary who should adopt a children’s rights approach; policy-makers also need to use the empirical insights available when making laws that will affect a specific group of children (i.e. those without two parents). The two-person requirement is not in the ‘best interests’ of the child because singling out certain families creates discrimination for children living

⁴⁹ M. Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (New York and London: Routledge, 1995) 143.

⁵⁰ This is evident from *B v C*, *op cit*, n18; *Re Z*, *op cit*, n16; *Z (A Child) (No 2)*, *op cit*, n17; and the author’s interview with a single mother of choice, Gemma, who had a child through surrogacy.

⁵¹ K Hollingsworth and H Stalford, *op cit*, n7, p67.

⁵² *Ibid*.

⁵³ See, S Golombok and J Rust, ‘The Warnock Report and single women: what about the children?’ *Journal of Medical Ethics*, 1986, 12, 182-186. At pp184-85. See also, S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, ‘Single Mothers by Choice: Mother–Child Relationships and Children’s Psychological Adjustment’, *Journal of Family Psychology*, 2016, Vol. 30, No. 4, 409–418, p410.

⁵⁴ K Hollingsworth and H Stalford, *op cit*, n7, p67.

outside the ‘two-parent’ model, which is contrary to Article 2 CRC. This could result in children experiencing stigma, or other disadvantages, for belonging to a single parent family.

The use of the child’s ‘best interests’ as a tactic to limit families to the nuclear ‘ideal’ is also evident in the *Warnock Report*⁵⁵ which sought to deny infertile single women ‘the chance of parenthood without the direct involvement of a male partner’.⁵⁶ Section 2.9 shows how it attempted to contain the possibilities of ARTs on the grounds of child welfare:

‘...The interests of the child dictate that it should be born into a home where there is a loving, stable, heterosexual relationship and that, therefore, the deliberate creation of a child for a woman who is not a partner in such a relationship is morally wrong.’

Single women were deemed incapable of providing the same ‘loving’ and ‘stable’ relationship to a child as a heterosexual couple⁵⁷ despite evidence at the time, presented by Golombok, who did not foresee any special problems for children brought up in single mother or lesbian families.⁵⁸ Golombok further noted the double standards in respect of Artificial Insemination by Donor (AID) or In Vitro Fertilisation (IVF), which was denied to single mothers who would make loving parents and ‘the many children who are born into non-loving and unstable heterosexual relationships’.⁵⁹ Despite Golombok’s evidence-based research, the rhetoric that children required a mother and a father stuck. The HFEA 1990 introduced the legal requirement that: ‘A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father)...’⁶⁰ The effect of the provision

⁵⁵ M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter referred to as ‘*The Warnock Report*’.

⁵⁶ *Ibid*, 2.9.

⁵⁷ *Ibid*, 2.9.

⁵⁸ S Golombok and J Rust, *op cit*, n53, pp184-185.

⁵⁹ *Ibid*, p185.

⁶⁰ According to Sally Sheldon, the inclusion of the need for a father was introduced in an amendment put forward by Conservative MP David Wilshire and passed by 226 to 174 votes. See S Sheldon, ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’, *Modern Law Review*, 2005, 68(4) 523-553, p 532.

was to keep the heterosexual two-parent family intact, and to discourage single women and lesbian couples from seeking AID or IVF.⁶¹

In 2006, the Department of Health concluded that the child's need for a father provision 'could not be justified in terms of evidence of harm...'.⁶² In the following year, The Joint Committee on the Human Tissue and Embryos (Draft) Bill was appointed.⁶³ The Joint Committee 'heard oral evidence from 46 witnesses comprising expert specialists, representatives of interested organisations and individuals.'⁶⁴ Giving evidence, the Human Fertilisation and Embryology Authority (HFE Authority) took the view that 'considerations relating to the welfare of the child should not make reference to particular family structures'.⁶⁵ Many acknowledged that the child's best interests depend less on family structure, and more on 'security and unconditional love'.⁶⁶ Following lengthy debate, the need for a father provision was replaced with the child's need for 'supportive parenting'.⁶⁷

(II) 'Single Parenthood by Choice': What are the Child Welfare Assumptions Underpinning the 'Two-Parent Model'?

Despite the removal of the child's 'need for a father' clause, which helped more single people access IVF, the government still decided to retain the two-parent requirement in section 54 HFEA 2008 because of the alleged 'additional responsibilities and burdens'⁶⁸ accompanying surrogacy. These additional responsibilities and burdens were neither explained, nor set out, by the government. It is suggested that this view

⁶¹ Single women and lesbians could access treatment, but the requirement presented an unfair and discriminatory barrier for these groups of prospective parents.

⁶² Department of Health. 2006. *Review of the Human Fertilisation and Embryology Act: Proposals for revised legislation* (Cm 6989). London: HMSO. 2.26, p10.

⁶³ Joint Committee 2007 *House of Lords, House of Commons Joint Committee on the Human Tissue and Embryos (Draft) Bill, Vol I: Report* (Session 2006–2007, HL paper 169-I, HC paper 630-II).

⁶⁴ *Ibid*, chapter 1, para 4.

⁶⁵ *Ibid*, chapter 1, para 227.

⁶⁶ *Ibid*.

⁶⁷ 'Supportive parenting' is defined in chapter 2 (fn 50).

⁶⁸ Dawn Primarolo (MP), *op cit*, n6.

of children as welfare dependents who cause burdens and responsibilities reveals misconceptions about single parenthood, poverty, and marriage. These misconceptions, which were evident during the enactment of section 13(5) HFEA 1990 and discussion of the HFE Bill 2008, have perpetuated the idea that children need two parents. McCandless and Sheldon note that despite the removal of the child's need for a father, supportive parenting reasserts 'the importance of the 'sexual family' form, albeit in modified form'.⁶⁹ The language of 'supportive parenting' suggests that 'children should ideally be raised by two parents: what changes is the necessity that one of the two must be a father...'.⁷⁰ It is argued that one assumption driving the belief that 'two parents are better than one' is that single parent families cost the state too much money. This concern was explicit during the House of Lords debate in 1990. Lord Lauderdale stated:

'To allow and encourage by state provision—it is at the taxpayers' expense ultimately—begetting of children into what are designed to be one-parent families does not make sense as regards serious sociological responsibility'.⁷¹

The HFEA 1990 was enacted 'at a time of widespread, media fuelled concern about increasing social security expenditure on single parent families...the need to ensure financial provision for children was significant'.⁷² Related to this, is an additional perception that children from single parents will be impoverished. During 80 hours of parliamentary debate on the HFE Bill 2008, it was stated that 'the influence of a father is indisputable in ...the likelihood that a child will live in poverty...'.⁷³

Another assumption, fuelling the preference of a two-parent model, is that the marital unit is the best environment to have children. During the House of Commons debate

⁶⁹ J McCandless and S Sheldon, "'No Father Required'? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008', *Feminist Legal Studies*, (2010) 18:201–225, p209.

⁷⁰ *Ibid.*

⁷¹ House of Lords Debates Volume 516, Column 1103 (6 March 1990). Available at <<https://api.parliament.uk/historic-hansard/lords/1990/mar/06/human-fertilisation-and-embryology-bill>> (last accessed 22/08/18).

⁷² J McCandless and S Sheldon, *op cit*, n69, p204.

⁷³ Tim Loughton, HC Debs, Vol 476, Col 211, (20 May 2008). Available at, <<https://publications.parliament.uk/pa/cm200708/cmhansrd/cm080520/debtext/80520-0012.htm#08052057001205>> (last accessed 22/08/18).

in 1990 on the ‘child’s need for a father’, ‘speakers who were reluctant to confine child bearing to the marital unit were often equally convinced that it should nevertheless remain the preserve of co-habiting heterosexual couples’.⁷⁴ David Blunkett MP argued for example, that ‘child bearing is not a right... man and woman together must take responsibility for the wellbeing and love of the child.’⁷⁵ McCandless and Sheldon state that a reading of the debates pre-1990:

‘Might suggest that parliamentarians were less concerned with the need to ensure a financial provider or hands-on (male) carer than they were with the symbolic value of ensuring children were only born into (quasi) marital units.’⁷⁶

The same criticism can be levelled at Primarolo’s position in 2008, where she insisted that only two parents are capable of dealing with the responsibilities and burdens of surrogate parenthood.⁷⁷ In order to challenge the assumptions that have grown around single parenthood, the following subsections consider whether ‘single parenthood by choice’ in the context of surrogacy: (1) costs the state too much and / or causes child poverty, and (2) denies children the same chances as those born to two parents.

(a) Does Single Parenthood by Choice Cause Poverty or Non-Optimal Outcomes for Children: What does the Evidence Indicate?

Studies on SMC, which were neglected from the debate on section 13(5), have mainly looked at women who had used donor insemination to become single mothers.⁷⁸ These

⁷⁴ *Ibid.*

⁷⁵ HC Debs Vol 174, Col 1023 (20 June 1990). Available at <<https://publications.parliament.uk/pa/cm198990/cmhansrd/1990-06-20/Debate-20.html>> (last accessed 22/08/18).

⁷⁶ J McCandless and S Sheldon, *op cit*, n69, p205.

⁷⁷ *Op cit*, n5.

⁷⁸ Leiblum S R, Palmer M G & Spector I. P (1995). ‘Nontraditional mothers single heterosexual, lesbian women and lesbian couples electing motherhood via donor insemination’. *Journal of Psychosomatic Obstetrics and Gynecology*, 16, 11–20; Klock S C., Jacob M C & Maier D (1996). ‘A comparison of single and married recipients of donor insemination’. *Human Reproduction*, 11, 2554–2557; C Murray & S Golombok (2005a). ‘Going it alone: solo mothers and their infants conceived by donor insemination’. *American Journal of Orthopsychiatry*, 75, 242–253, <http://dx.doi.org/10.1037/0002-9432.75.2.242>; and C Murray & S Golombok (2005b). ‘Solo mothers and their donor insemination infants: follow-up at age 2 years’. *Human Reproduction*, 26, 1655–1660, <http://dx.doi.org/10.1093/humrep/deh823>.

studies found that women seeking donor insemination were ‘older, highly educated, professional women who are financially secure’.⁷⁹ In 2009, Jadva *et al.*, collected further data on the motivations and experiences of 291 single mothers by choice using online questionnaires. The findings from this sample of single mothers by choice indicate that:

‘[S]ingle women who choose to become mothers are a *distinct group* who differ in a number of important ways from those who become single mothers following separation or divorce. The mothers in this study tended to be well educated women who held full-time jobs and were not experiencing marked financial difficulties.’⁸⁰

Carone *et al.*’s study also indicates that single fathers of choice are well educated, financially secure, and have professional occupations.⁸¹ The study found that the men’s decision to have a child without a partner was ‘complex and carefully considered, and one that was taken following discussion with family, friends, health practitioners and other single fathers’.⁸² These findings indicate that single parents by choice are a very different group than parents who find themselves single as a result of a relationship breakdown or unintended pregnancy. Therefore, the government’s suggestion that single parenthood causes child-poverty⁸³ does not stand up to scrutiny in the surrogacy context.

The second misconception driving the two-parent model, is that marriage is the ‘best’ or ‘optimum’ environment to raise children. McCandless and Sheldon observe that the debates surrounding s 13 (5) HFEA 1990 frequently asserted that the marital unit was seen as ‘the only sure start in life for children’.⁸⁴ Evidence shows that the two-parent marital unit is not the only forum to raise children who are happy and stable. In 2005

⁷⁹ *Ibid*, Klock S C *et al*, p2557. See also C Murray and S Golombok, p251.

⁸⁰ V Jadva, S Badger, M Morrisette and S Golombok, ‘Mom by Choice, Single by Life’s Circumstances ... Findings from a Large Scale Survey of the Experiences of Single Mothers by Choice’ (2009) 12(4) *Human Fertility* 175, p182. (Emphasis added).

⁸¹ See N Carone, R Baiocco and V Lingardi, ‘Single fathers by choice using surrogacy: why men decide to have a child as a single parent’, *Human Reproduction*, Vol.32, No.9 pp. 1871–1879, 2017. P1877.

⁸² *Ibid*, p1877.

⁸³ E.g. Tim Loughton (MP), *op cit*, n73.

⁸⁴ J McCandless and S Sheldon, *op cit*, n69, p205.

a study by Murray and Golombok, which compared 27 single heterosexual mother families and 50 married heterosexual parent families, all with infants conceived by donor insemination, found no differences between the two family types in terms of mothers' psychological well-being, adaptation to motherhood, expressed warmth, and emotional involvement or bonding with their infants.⁸⁵ Murray and Golombok also found that the families continued to function well as the children reached 2 years old.⁸⁶ The aim of Golombok *et al*'s more recent study, reported in 2016, was to:

‘Add to the small but growing body of research on solo mother families by conducting an in-depth, multimethod, multi-informant, controlled study of families with children who were old enough to understand that they did not have a father’.⁸⁷

The study compared 51 solo-mother families with a 4-9 year old conceived by donor insemination and 52 two-parent donor conceived families.⁸⁸ The investigators hypothesised that ‘children’s adjustment would not be a direct function of the number of parents in the family’.⁸⁹ Instead, children’s adjustment would be associated with the ‘quality of mother-child relationships’.⁹⁰ This hypothesis proved correct and Golombok and her colleagues found that the donor-conceived children of SMC experienced similar levels of parenting quality to the comparison group of donor-conceived children in traditional two-parent families.⁹¹ This accords with an earlier study in 1998 by Chan, Raboy and Patterson,⁹² which compared 30 solo mother families and 50 two-parent lesbian families with 7-year-old children conceived by donor insemination. The study found ‘no significant differences among children’s adjustment ... as a function of the number of parents in the home’.⁹³

⁸⁵ C Murray & S Golombok (2005a), *op cit*, n78.

⁸⁶ C Murray & S Golombok (2005b), *op cit*, n78.

⁸⁷ S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, *op cit*, n53, p410.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p415.

⁹² R. W Chan, B Raboy & CJ Patterson, (1998). ‘Psychosocial adjustment among children conceived via donor insemination by lesbian and heterosexual mothers’. *Child Development*, 69, 443–457.

⁹³ *Ibid.*, p 453.

Golombok *et al*'s findings also suggested that 'solo motherhood, in itself, does not result in psychological problems for children'.⁹⁴ The study acknowledged that:

'a large body of research on the psychological wellbeing of children in single-mother families formed by divorce has consistently shown that children whose parents divorce are more likely to show emotional and behavioural problems than are children in intact families.'⁹⁵

However, the children's difficulties were largely associated with aspects of the divorce, rather than single-parenthood, 'including conflict between parents and financial hardship following divorce'.⁹⁶ Therefore, unlike divorced or unmarried single mothers, SMC make an active decision to parent alone and their children are, 'less likely to have experienced the economic hardship or maternal psychological problems that commonly result from marital breakdown and unplanned single parenthood'.⁹⁷ Unelected single mothers, also 'experience a considerable drop in income, which can cause problems for children as well as stress for the mother... single mothers by choice are spared all this'.⁹⁸ This small, but growing, body of research shows that single parenthood by choice is a completely different situation than single parenthood resulting from unplanned pregnancy or relationship breakdown. The nuances exposed by this research calls into question the government's deep-rooted belief that children cannot thrive without two parents.

Although Golombok's study is limited for the purposes of this chapter (it looks at donor conceived children with single parents and not surrogacy-conceived children), two parallels can still be made. Firstly, like the SMC who had a donor-conceived child, single parents entering into surrogacy arrangements also *choose* to parent alone and thus differ from those who unintentionally find themselves in that situation due to

⁹⁴ S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, *op cit* n53, p416.

⁹⁵ *Ibid*, p409.

⁹⁶ *Ibid*, p409.

⁹⁷ *Ibid*, p410.

⁹⁸ The Guardian, 14th September 2015, Helen Russell, 'There's no stigma': Why so many Danish women are opting to become single'. Available at <https://www.theguardian.com/lifeandstyle/2015/sep/14/no-stigma-single-mothers-denmark-solomors> (last accessed 18/06/17).

unplanned pregnancy or marital breakdown. Secondly, like SMC using donors, single parents entering into surrogacy arrangements have not experienced the problems associated with marital breakdown or unplanned single parenthood. Therefore, surrogacy-conceived children born to single parent families are unlikely to encounter the emotional and behavioural problems some children experience following divorce and the subsequent conflict and financial hardship that often follows when parents divorce.

Golombok explains that the active decision of solo mothers to parent alone has contributed to the positive outcomes for these families because they ‘are extremely wanted children whose mothers went to great lengths to conceive them whereas divorced single mothers and unmarried single mothers who had unplanned pregnancies did not set out to parent alone’.⁹⁹ It is recalled from *B v C*, that the single father, Mr Casson had wanted to be a father for some time and ‘waited until his circumstances were settled in terms of a job and home to enable him to provide the care a child would need.’¹⁰⁰ This suggests that the intention to be a single mother or father using surrogacy would also contribute to positive parent-child relationships and positive child outcomes. Further research needs to be carried out to compare single parent surrogacy families (by choice) and two parent surrogacy families, to confirm these parallels. More research also needs to be undertaken to look at single fathers by choice¹⁰¹ to see whether these parallels apply to single men. Nevertheless, the comparisons drawn between Golombok’s study and single parent surrogacy present a challenge to the rhetoric that children only fare well with two parents. The government’s decision not to use any of the available research on single parenthood by choice during the discussion on section 54 HFE Bill 2008, shows that the relationship provisions were made without ensuring appropriate consideration was given to the best interests of the child or the ‘empirically verified insights’¹⁰² on single parenthood by choice that were available.

⁹⁹S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, *op cit*, n53, p416.

¹⁰⁰ [10] (Theis J).

¹⁰¹ N Carone *et al*, *op cit*, n81, was the only study found on single fathers of choice.

¹⁰² K Hollingsworth and H Stalford, *op cit*, n7, p53.

3.3 Exploring the Judiciary's Response to the 'Relationship Provisions': Has a Substantive Children's Rights Approach been Achieved?

Given the legislative limitations with the HFEA 2008, this section uses Tobin's framework, and other indicators of a children's rights approach,¹⁰³ to see how the judiciary have responded to the 'relationship provisions' in *Re Z (A Child)*¹⁰⁴ and *Z (A Child) (No 2)*.¹⁰⁵

(I) A Critique of Munby P's Methodology in *Re Z (A Child)*

In *Re Z*,¹⁰⁶ Munby P stated that he could not read down the two-person requirement using section 3(1) of the Human Rights Act 1998,¹⁰⁷ because to do so would 'remove "the very core and essence"...of what Parliament has enacted...'¹⁰⁸ Nevertheless, Tobin suggests that these constitutional constraints are sometimes overstated, because the:

'[G]rowing recognition and acceptance of children's rights within society provide greater opportunities for judges to develop and act upon interpretative theories that are receptive to and grounded in the values that underlie the substantive model of children's rights under the CRC'.¹⁰⁹

The Parental Order Regulations 2010 have, to some extent, given the judiciary greater opportunities to 'develop and act upon interpretative theories' that are grounded in the CRC. Even in *X and Y*,¹¹⁰ which was decided before the 2010 Regulations made the child's welfare the court's 'paramount' concern, Hedley J introduced three questions to facilitate the retrospective authorisation of payments that go beyond reasonable

¹⁰³ *Op cit*, n7.

¹⁰⁴ *Op cit*, n16.

¹⁰⁵ *Op cit*, n17.

¹⁰⁶ *Op cit*, n16.

¹⁰⁷ The provision states, 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

¹⁰⁸ [33] (Munby P). The facts of the judgment are set out in chapter 2 (part 2.2).

¹⁰⁹ J Tobin, *op cit*, n7, p579.

¹¹⁰ *Op cit*, n45.

expenses, despite commercial surrogacy being explicitly prohibited by the Surrogacy Arrangements Act 1985 (SA Act 1985).¹¹¹ First, ‘was the sum paid disproportionate to reasonable expenses?’¹¹² Second, ‘were the applicants acting in good faith and without ‘moral taint’ in their dealings with the surrogate mother?’¹¹³ Third, and finally, ‘were the applicants party to any attempt to defraud the authorities?’¹¹⁴ In answering these questions, the court reminded itself that:

‘it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order’.¹¹⁵

Since the 2010 Regulations,¹¹⁶ the courts have acknowledged in stronger terms that when deciding whether to authorise payments retrospectively, the court must regard the child’s welfare as the ‘paramount’ consideration. Hedley J noted in *Re L (A Minor)*¹¹⁷ that the effect of the 2010 Regulations was to import Section 1 of the Adoption and Children Act 2002 into Section 54 HFEA 2008. This means ‘that welfare is no longer merely the court's first consideration but becomes its paramount consideration.’¹¹⁸ Hedley J continued:

‘The effect of that must be to weight the balance between public policy considerations and welfare (as considered in *RE X and Y* (supra)) decisively in favour of welfare...’¹¹⁹

The Parental Order Regulations 2010¹²⁰ have therefore given the judiciary the opportunity to interpret section 54 more creatively, in order to ensure the ‘welfare’ of

¹¹¹ Section 2.

¹¹² [21] (Hedley J).

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ [24] (Hedley J).

¹¹⁶ *Op cit*, n3.

¹¹⁷ [2010] EWHC 3146.

¹¹⁸ [9] (Hedley J).

¹¹⁹ [10] (Hedley J).

¹²⁰ *Op cit*, n3.

the surrogacy-conceived child is ‘paramount’.¹²¹ The judiciary have made use of the Regulations in its decisions on 54 (8) HFEA 2008, which present ‘a very clear picture...of a permissive approach to payments beyond reasonable expenses, meaning that recognition of parenthood as a result of a commercial surrogacy agreement is almost a foregone conclusion’.¹²² It is suggested that Munby P could have used the paramountcy principle in the Regulations to award a parental order to Z and his father.

This would not be an unusual approach for Munby P, who developed and acted upon interpretative theories that are grounded in the values that underlie the ECHR in ‘*Re X*’.¹²³ In this case, decided before ‘*Re Z*’, Munby P awarded a parental order to a child who was almost 3 years old, notwithstanding the clear rule in section 54(3) HFEA 2008 that a parental order must be applied for within 6 months of the child’s birth. Munby P held that even if his decision was a ‘step too far’, his reasoning would be justified having regard to the ECHR and the child’s Article 8 right to a private and family life:

‘[T]he statute must be ‘read down’ in such a way as to ensure that the “essence” of the protected right is not impaired and that what is being protected are rights that are “practical and effective” and not “theoretical and illusory.”’¹²⁴

It is disappointing that Munby P did not utilise the same reasoning in ‘*Re Z*’; If reading down the two-person requirement was a ‘step too far’ then surely, he could have used Z’s right to a private and family life under Article 8 ECHR to justify his position. It is recalled from the previous chapter that the inconsistent approaches between the two judgments could betray a preference to the two-parent model, which was only at stake in *Re X*.¹²⁵ The refusal to ‘read down’ the two-person requirement has compounded the discriminatory effects of the legislation, and leaves children with single parents in an uncertain social and legal position.

¹²¹ It is acknowledged however, that this depends on how the judiciary interpret ‘welfare’.

¹²² C Fenton-Glynn, ‘Case Commentary: The regulation and recognition of surrogacy under English law: an overview of the case-law’, *Child and Family Law Quarterly*, Vol 27, No 1, 2015, pp83-96. P87.

¹²³ *Op cit*, n39.

¹²⁴ [58] (Munby P).

¹²⁵ See chapter 2, part 2.1.

(II) ‘Z (A Child) (No. 2): A Missed Opportunity for Promoting Children’s Rights?’

In the subsequent case, ‘Z (A Child) (No. 2)’,¹²⁶ the court held that the exclusion of single parents from applying for a parental order is incompatible with the child’s (and his father’s) right to respect for a private and family life (Article 8), taken in conjunction with the right to non-discrimination (Article 14 ECHR).¹²⁷ The judgment acknowledges that children in Z’s position have rights, specifically Articles 8 and 14 of the Convention but falls short of achieving a more ‘substantive children’s rights’¹²⁸ approach. Firstly, the judgment is too ambiguous in its discussion of the child’s right to private and family life and non-discrimination in Articles 8 and 14 ECHR. Secondly, it fails to acknowledge the relevance of the CRC or use its provisions and principles to help interpret and apply Articles 8 and 14 ECHR. Thirdly, the judgment neither acknowledges nor discusses the relevance of the ‘enduring relationship’ threshold and how it could also affect the child’s rights within the ECHR and CRC. Finally, the judgment does not emphasise how the child’s rights to ‘identity’ are affected by being denied a parental order. The first three criticisms are discussed in the following sub-sections, and the latter is discussed in the final part of the chapter.

(a) A Superficial Treatment of Articles 8 and 14 ECHR?

In ‘Z (A Child) (No. 2)’, Munby P discussed the child’s rights to Article 8 and 14 ECHR by loosely referring to the two linked ECtHR cases of *Mennesson v France*¹²⁹ and *Labassee v France*.¹³⁰ However, the judgment failed to analyse those decisions in any detail or highlight the key message from those cases;¹³¹ namely, the importance of recognition of the legal parent-child relationship for the child’s identity and family life. In *Mennesson*, it was held that France’s refusal to give the children’s parents legal

¹²⁶ *Op cit*, n17.

¹²⁷ As such, Munby P issued a declaration of incompatibility between the two-person requirement in section 54(1) HFEA 2008 and Articles 8 and 14 ECHR.

¹²⁸ J Tobin, *op cit*, n7.

¹²⁹ (*Application no. 65192/11*) European Court of Human Rights, 26 June 2014.

¹³⁰ (*Application no. 65941/11*) European Court of Human Rights, 26 June 2014.

¹³¹ The judgments are referred to in passing at paras [9] and [12].

parentage violated the twins' right to respect for private life under Article 8, because it left the children in a state of 'legal uncertainty' and undermined their identity within French society.¹³² The ECtHR recognised nationality and the right to inheritance as the relevant elements of identity¹³³ and found that this was affected because despite the children's genetic father being French, they were unable to obtain French nationality.¹³⁴ In addition, the children's inheritance rights were 'less favourable'.¹³⁵ The Court found that by preventing the recognition and establishment under domestic law of the relationship between the twins and their genetic father, France 'overstepped the permissible limits of its margin of appreciation.'¹³⁶ This refusal was held by the ECtHR to be contrary to the paramountcy of the best interests of the child principle.¹³⁷ Munby P could have drawn upon *Mennesson* to emphasise how denying legal parentage to single intended parents raises the same rights-implications for the surrogacy-conceived child's family life and identity. Without a parental order, children are left in a situation of 'legal uncertainty'; their identity as the biological child of an intended parent through surrogacy is undermined, particularly where an adoption order is applied for instead.¹³⁸ Instead of undertaking a rigorous assessment of *Mennesson*, the decision adopts a 'superficial approach'¹³⁹ to Article 8 ECHR, whereby the central relevance of Z's right to respect for a private and family life is identified, but the actual scope and nature of this right, and how it is affected by the single person exclusion¹⁴⁰ are not discussed.

In '*Z (a child) (No 2)*', the child's right to non-discrimination was not engaged with whatsoever, despite the judgment acknowledging that 'this is in reality, a discrimination case.'¹⁴¹ The judgment should have reiterated that children with single

¹³² [96].

¹³³ [97] and [98].

¹³⁴ [97].

¹³⁵ [98].

¹³⁶ [100].

¹³⁷ [84].

¹³⁸ This is discussed in part 3.

¹³⁹ J Tobin, *op cit*, n7, p601.

¹⁴⁰ *Ibid*.

¹⁴¹ [13] (Munby P).

parents and platonic co-parents are treated differently to children whose parents are a 'couple'. The discrimination faced by the child in '*Z (A Child) (No. 2)*', is akin to the discrimination faced by children born outside the institution of marriage, so it is surprising the judgment did not refer to seminal cases such as *Marckx v Belgium*,¹⁴² which concerned the discriminatory treatment of an unmarried mother and her daughter. At the time, Belgium law did not recognise a legal bond between an unmarried mother and her child.¹⁴³ The only way Paula Marckx, the mother, could improve the child's status was to adopt her child. The Court held that this discriminatory treatment violated the mother's and child's Article 8 right, taken in conjunction with Article 14. Namely, that under Belgian law, 'a "legitimate" child is fully integrated from the moment of his birth into the family of each of his parents, whereas a recognised "illegitimate" child, and even an adopted "illegitimate" child, remains in principle a stranger to his parents' families'.¹⁴⁴ Accordingly, the Court stated that, 'respect for family life implies in particular...the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family'.¹⁴⁵ By analogy, the HFEA 2008 fails to uphold the principles in *Marckx*, because it does not provide legal safeguards that allow the child's integration into his / her solo-parent family. As the court said in *Marckx*, a 'law that fails to satisfy this requirement violates paragraph 1 of Article 8'.¹⁴⁶

The *Marckx* decision was confirmed in *Johnston and Others v Ireland*,¹⁴⁷ another case omitted from *Z (A Child) (No 2)*. *Johnston* concerned a cohabiting couple who were unable to marry. Mr Johnston, the first applicant, was unable to divorce his wife because Article 41.3.2 of the Irish Constitution rendered divorce unavailable in Ireland.¹⁴⁸ Mr Johnston and his new partner had a daughter (out of wedlock) who suffered from several legal disadvantages when compared with children born to

¹⁴² 31 European Court of Human Rights (ser. A) (1979).

¹⁴³ [14].

¹⁴⁴ [44].

¹⁴⁵ [31]

¹⁴⁶ [31].

¹⁴⁷ (Application no. 9697/82)

¹⁴⁸ [17].

married parents. For example, ‘an illegitimate child inheriting property from his parents is potentially liable to pay capital acquisition tax on a basis less favourable than a child born in wedlock’.¹⁴⁹ The question arose as to whether respect for family life in Article 8 ECHR, which the family was said to enjoy,¹⁵⁰ ‘imposed a positive obligation on the State to improve the child's legal situation’.¹⁵¹ The Court considered that the *Marckx* principles were ‘equally applicable’ to the case of an unmarried couple, both of whom are the child's birth parents. The court held that an examination of the child’s present legal situation, seen as a whole, reveals that it:

‘Differs considerably from that of a legitimate child; in addition, it has not been shown that there are any means available to her or her parents to eliminate or reduce the differences...the absence of an appropriate legal regime reflecting the third applicant’s natural family ties amounts to a failure to respect her family life’.¹⁵²

By analogy, the absence of an appropriate legal regime in the HFEA 2008 that supports the surrogacy-conceived child’s ties with his/her single parent also amounts to a discriminatory interference with the child’s family life, privacy and identity. It is unacceptable that more than three decades on from *Marckx* and *Johnston v Ireland*, the children of single parents continue to be discriminated against in this new context.

(b) Using the ECHR and CRC Together to Maximise the Discussion on Children’s Rights?

The lack of discussion of *any* of the rights within the CRC means the judgment is a missed opportunity for using the CRC in conjunction with the ECHR. In this respect the judgment fails to ‘explicitly adopt a child-rights approach by drawing on and utilising to maximum effect the formal legal tools which give effect to children’s rights, including (but not confined to) the CRC’.¹⁵³ As Kilkelly has observed, ‘It is important to look for alternative methods to maximize its [the CRC] potential for

¹⁴⁹ [33].

¹⁵⁰ [56].

¹⁵¹ [71]

¹⁵² [75].

¹⁵³ K Hollingsworth and H Stalford, *op cit*, n7, p54.

vindicating the rights of children...'.¹⁵⁴ She suggests that the principles and the provisions of the CRC should be used to offer guidance on the interpretation and application of the ECHR.¹⁵⁵ This, Kilkelly suggests, 'would help to fulfil the potential of both treaties to protect and promote children's rights at the international level and at the domestic level where the ECHR is part of domestic law'.¹⁵⁶ Rather than using the CRC to offer guidance on the interpretation and application of Articles 8 and 14 ECHR, '*Z (A Child) (No. 2)*' fails to acknowledge the relevance of Article 16 CRC. The provisions states, 'no child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.'¹⁵⁷ This could have been utilised alongside a discussion of Article 8 ECHR to emphasise how leaving children without a parental order affects the entire family unit, and ignores the 'supportive role of the family'.¹⁵⁸ The use of the CRC could have helped expose the magnitude of the children's rights problems with the two-person requirement.

'*Z (A Child) (No. 2)*' also fails to use the CRC's principle of non-discrimination in Article 2 CRC (which applies to the whole of the CRC) to offer guidance on the interpretation and application of Article 14 ECHR. Article 2 CRC forbids the State Party to treat the child differently on the basis of race, sex or other status, when doing so will impair the child's enjoyment to another right in the Convention. The Committee on the Rights of the Child has emphasised that Article 2 CRC 'requires that all children enjoy Convention rights equally, regardless of their status (under Article 2(1)) or, notably, that of their parents (under Article 2(2))'.¹⁵⁹ The differential treatment between children with single parents and those with two parents discriminates on the basis of their parents' status, which is contrary to the Committee's guidance. Moreover, as *General Comment No. 7* observes, discrimination has

¹⁵⁴ U Kilkelly, *op cit*, n7, p311.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ Article 16 (2) CRC.

¹⁵⁸ J Tobin, *op cit*, n7, p587

¹⁵⁹ U Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations', 61 *Northern Ireland Legal Quarterly*, 245 2010, p251.

extremely negative effects for children. It ‘excludes children from full participation in society and affects children’s opportunities and self-esteem, as well as encouraging resentment and conflict among children and adults.’¹⁶⁰ It is argued that section 54(1) HFEA sends out a discriminatory message to children with single intended parents, who are treated as second class citizens because of their family structure. As the Committee on the Rights of the Child has acknowledged:

‘[T]he family has always been shaped in a diversity of ways and naturally faces different challenges or living conditions... Could it be considered that only in certain circumstances would the family or family life have decisive social value?’¹⁶¹

By excluding all families except the genetic two-parent model, the HFEA 2008 sends out a discriminatory message that only the two-parent families have ‘decisive social value’. This, in the words of Baroness Hollis, stigmatises children ‘in the name of some family form that we wish them to have, but that they do not have, and cannot, as children, choose to have it’.¹⁶² The impact of this was exposed during an interview with Gemma, a single parent by choice who had decided to enter a surrogacy arrangement. She was unable to apply for a parental order and faced great uncertainty as a result of her single status. Section 54 HFEA 2008 sends out a message that children with single parents are undeserving of the same opportunities and participation in society that children with two parents enjoy. It is disappointing that *Munby P* did not utilise Article 2 CRC, or draw upon the work of the Committee of the Rights of the Child, to interpret and apply Article 14 ECHR, and to show how the ‘relationship provisions’ discriminate against children living in non-nuclear families.

¹⁶⁰ UN Committee on the Rights of the Child (CRC), *General comment No. 7* (2005): *Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1 available at <http://www.refworld.org/docid/460bc5a62.html> (accessed 14th February 2018). At 11 (b) (iv).

¹⁶¹ Committee on the Rights of the Child, Day of General Discussion on the Role of the Family, UN Doc CRC/C/34 (1994), 36 [190]-[191]. Available at <<http://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations1994.pdf>> (last accessed 10/12/17).

¹⁶² See Baroness Hollis of Heigham when discussing the child’s need for a father provision. HL Debs, Vol 696, Col 81 (21 January 2008), available at <<http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80121-0012.htm>> (accessed 17/12/16).

Moreover, Munby P should also have considered Article 6 CRC in connection with Article 14 ECHR, thus maximising the children's rights discussion on the impact of the 'relationship provisions' on child development. Article 6 CRC says that States have an 'obligation to ensure the survival, growth and development of the child, including the physical, mental, moral, spiritual and social dimensions of their development'. As Peleg observes, the child's right to non-discrimination 'should be protected not only for its own merit, but also in order to prevent a 'negative effect' on the child's development'.¹⁶³ Therefore, denying a parental order not only discriminates against children without two-parents, but also affects their development. Overall, the judgment should have done much more to draw out the rights implications of the relationship provisions and how it is unacceptable for children with single parents to be treated differently because of their parents' relationship status. Without discussing the ECHR and CRC in a more holistic and detailed way, these children's rights have been considerably minimised by the judiciary.

(c) What about the Children's Rights Implications of the 'Enduring Family Relationship' Requirement?

Crucially, the court in '*Z (A Child) (No. 2)*', did not engage whatsoever with the second discriminatory relationship provision in the HFEA 2008; the 'enduring family relationship' requirement. It is recalled from the last chapter, that the 'enduring family relationship' threshold has been interpreted in a conjugal way by the courts.¹⁶⁴ In '*Re F and M*',¹⁶⁵ which was discussed in the previous chapter, the intended parents successfully argued they were in an enduring relationship, but the focus was very much upon the duration of the couple's relationship and their plans to marry. This should have been of much less importance than their ability to care for the children. The fact that a couple plans to marry does not make them better parents, nor does the

¹⁶³ N Peleg, 'Time to Grow Up: The UN Committee on the Rights of the Child's Jurisprudence of the Right to Development', Chapter 22, p 371, in *Law and Childhood Studies: Current Legal Issues*, Volume 14, edited by M Freeman (2012), p377.

¹⁶⁴ See chapter 2 (part 2.3), which discusses the judiciary's conjugal interpretation of the enduring family relationship threshold in *Re F and M (Children) (Thai Surrogacy) (Enduring Family Relationship)* [2016] EWHC 1594 (Fam) (hereafter '*Re F and M*') and; '*Re X*' *op cit*, n39.

¹⁶⁵ *Ibid.*

duration of their relationship. If the judiciary moved away from a conjugal interpretation of ‘enduring family relationship’ this would allow platonic co-parents to apply for a parental order. Factors such as love, commitment, parenting and care-giving contingencies should be the focus of CAFCASS officers and the courts, and this should replace the legislation’s current emphasis on conjugality and endurance, which tell us little about the best interests of the child.

A further problem with the ‘enduring family relationship’ threshold, is that it could encourage couples to remain in a long and unhappy relationship, because this would satisfy the ‘endurance’ and ‘conjuality’ factors. This risk arose in *Re X*,¹⁶⁶ where the couple had tried to reconcile for the purposes of applying for a parental order. The fact that only a couple can apply for a parental order, demonstrates that the HFEA’s ‘relationship provisions’ are aimed to discourage divorce and separation. As Carol Smart explains, divorce has been equated with harming children throughout the second half of the twentieth century.¹⁶⁷ She explains that this concern peaked in the late 1980s and 1990s because social scientific evidence ‘appeared to give weight to the idea that divorce harmed children in a range of ways including affecting their health, educational achievement, and marriage prospects.’¹⁶⁸ However, this attitude towards divorce harming children changed after a new ethos emerged in the Children Act 1989, ‘based on the idea that divorce might sever spousal relationships, but that it did not and should not impede parental relationships and obligations’.¹⁶⁹ As such, ‘divorce no longer had to mean family breakdown; it could simply mean marital breakdown, because the family could continue to survive (even thrive) across households.’¹⁷⁰ The enduring family relationship threshold creates a perception that divorce and separation are harmful for the child, and that parents should remain together. This ignores the fact that separation and / or divorce may actually resolve the conflicts and tensions that

¹⁶⁶ *Op cit*, n39.

¹⁶⁷ C Smart, ‘Divorce in England 1950–2000: A Moral Tale?’, Chapter 16 in [Cross Currents: Family Law and Policy in the US and England](#), edited by Sanford N. Katz, John Eekelaar, and Mavis MacLean, (Oxford University press), 2000, p382.

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid*, p383.

exist within the family, thus allowing the child to benefit from a relationship with both parents.

In practice the ‘enduring family relationship’ threshold might only delay the parents’ separation because once the parental order is awarded the couple no longer have to stay together. Delaying separation does not necessarily protect children. In 1999, Pryor explained that:

‘In children whose parents subsequently separate, increased levels of distress and behavior problems are evident before the separation and these account for high levels of distress after separation, especially in boys ... Thus, problems, which are often assumed to arise as a result of a separation, are found to be present before family dissolution occurs ... unhappy but intact families in childhood do not necessarily protect young people.’¹⁷¹

Therefore, if the ‘enduring family relationship’ encourages couples to stay together to apply for a parental order, which they cannot do earlier than six weeks after the child is born,¹⁷² the baby could pick up on any conflict during that period. A more recent 2015 poll of young people aged 14-22 with experience of parental separation, which was carried out by ComRes on behalf of family law organisation Resolution, found that an overwhelming majority (82%) of the young people surveyed said that, despite their feelings at the time, they felt it was ultimately better that their parents divorced rather than stay together unhappily.¹⁷³ The enduring family relationship requirement should be removed because it could encourage couples to remain in unhappy relationships for the sake of applying for a parental order.

3.4 What about the Identity Rights of Children with Single Parents?

¹⁷¹ J Pryor, ‘Waiting Until They Leave Home: The Experiences of Young Adults Whose Parents Separate’, *Journal of Divorce & Remarriage*, (1999) 32:1-2, 47-61, DOI: 10.1300/J087v32n01_04. At p49.

¹⁷² Section 54(7) HFEA 2008.

¹⁷³ http://www.familylaw.co.uk/news_and_comment/don-t-stay-together-for-our-sake-say-children#.WU0FCOvyuUk (last accessed 23/06/17).

One major issue neglected from ‘*Re Z*’ and ‘*Z (A Child) (No. 2)*’ is the child’s right to identity;¹⁷⁴ in particular, the rights implications for the children of single parents who do not have a parental order. Article 7 of the CRC provides the child with the right to be ‘registered immediately after birth’, ‘the right from birth to a name’, ‘the right to acquire a nationality’ and ‘as far as possible, the right to know and be cared for by his or her parents’. Article 8 of the CRC recognises ‘the right of the child to preserve his or her identity, including nationality, name and family relations.’ Identity is an important ‘facet of human development’ and is considered to be in the best interests of the child.¹⁷⁵ Nevertheless, the concept of ‘identity’ is contested and difficult to define.¹⁷⁶ Tatum suggests that the answer to the question, ‘who am I’, is ‘shaped by individual characteristics, family dynamics, historical factors, and social and political contexts’.¹⁷⁷ On this definition, being born as a result of surrogacy and having different ‘parents’ (e.g. gestational, social and legal) will likely shape the child’s identity.

It is suggested that a parental order is the ‘key’ to shaping, recognising and respecting the child’s identity as a surrogacy-conceived child. According to Munby P in ‘*Re X*’¹⁷⁸ a parental order is important for the identity of all surrogacy-conceived children because it:

‘Goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family.’¹⁷⁹

¹⁷⁴ Articles 7 and 8 CRC.

¹⁷⁵ S Ishaque, ‘Islamic Principles On Adoption: Examining The Impact Of Illegitimacy And Inheritance Related Concerns In Context Of A Child's Right To An Identity’, *International Journal of Law, Policy And The Family* 22, (2008), 393-420, p395

¹⁷⁶ Jaap E. Doek, Chairperson of the UN Committee on the Rights of the Child, questions whether a definition of ‘identity’ is even possible. See Jaap E. Doek ‘Article 8: The right to Preservation of Identity and Article 9: The Right Not to Be Separated from His or Her Parents’ in *A Commentary on the United Nations Convention on the Rights of the Child* edited by A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde. Martinus Nijhoff Publishers (2006).

¹⁷⁷ Tatum, B. D. (2000). ‘The complexity of identity: “Who am I?.” ’ In Adams, M., Blumenfeld, W. J., Hackman, H. W., Zuniga, X., Peters, M. L. (Eds.), *Readings for diversity and social justice: An anthology on racism, sexism, anti-semitism, heterosexism, classism and ableism* (pp. 9-14). New York: Routledge.

¹⁷⁸ *Op cit*, n39.

¹⁷⁹ *Ibid*, [54] (Munby P).

The following sub-sections consider which aspects of the child's identity are affected by the absence of a parental order.

(I) Legal Recognition of the Parent-Child Relationship

According to Theis J in *A v P (Surrogacy: Parental Order: Death of Applicant)*,¹⁸⁰ 'the concept of identity includes the legal recognition of relationships between children and parents'.¹⁸¹ A parental order is crucial for protecting the legal ties between the child and his / her intended parents, and therefore the child's identity. In *A v P* Theis J held that 'the primary aim of s 54 is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants'.¹⁸² The effect of the parental order is that the 'child is treated as though born to the applicants',¹⁸³ and this has clear implications for the child's 'right to respect for family life under Article 8'.¹⁸⁴ In *J v G*¹⁸⁵ Theis J highlighted the implications of legal recognition of the child's relationship with his / her parents:

'A parental order will safeguard the children's welfare on a lifelong basis as it will

(1) Confer joint and equal legal parenthood and parental responsibility upon both the applicants. This will ensure each child's security and identity as lifelong members of the applicants' family.'¹⁸⁶

Accordingly, the exclusion of single parents from section 54 HFEA 2008 leaves children without 'security and identity', 'a sense of finality and completeness',¹⁸⁷ and 'the lifelong security and stability that their welfare clearly demands'.¹⁸⁸ The child's relationship with his / her intended parent cannot be legally recognised without

¹⁸⁰ [2011] EWHC 1738 (Fam), [27] (Theis J). Hereafter '*A v P*'.

¹⁸¹ [28] (Theis J).

¹⁸² [24] (Theis J).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Op cit*, n44, paras [27]-[29].

¹⁸⁶ [27] (Theis J).

¹⁸⁷ [28] (Theis J).

¹⁸⁸ [29] (Theis J).

recourse to another less appropriate order. Theis J set out several disadvantages with denying the child in *A v P* a parental order:

- ‘(i) There is no legal relationship between the child and his biological father who is also the commissioning father
- (ii) The child is denied the social and emotional benefits of recognition of that relationship
- (iii) The child may be financially disadvantaged if he is not recognised legally as the child of his father (in terms of inheritance)
- (iv) The child does not have a legal reality which matches the day to day reality’.¹⁸⁹

In light of these problems, it is unsurprising that a parental order has been declared the ‘optimum legal...solution’¹⁹⁰ for a surrogacy-conceived child.

Without legal recognition of the parent-child relationship, aspects of the child’s right to identity, including nationality,¹⁹¹ are compromised. In the case of *A and B (No 2 - Parental Order)*,¹⁹² Theis J warned that if a parental order cannot be awarded, and there are no other orders in place, the intended parents ‘may not have parental responsibility, which may affect their ability to take certain steps on behalf of the child, for example being able to consent to medical treatment or apply for a passport.’¹⁹³ This is particularly problematic where the single intended parent has entered into an international surrogacy arrangement abroad, because their child may be recognised as a different nationality. In the US for example, any child born through surrogacy is automatically a US citizen. The award of a parental order also affects the child’s birth certificate. In the UK, the surrogate and her partner, if she has one, are named on the child’s birth certificate by virtue of sections 33 and 38 HFEA 2008. When a parental order is made, a new certificate is issued, naming the intended parents as the child’s parents. To deny such an important order on the basis of the intended parent’s status

¹⁸⁹ [26] (Theis J).

¹⁹⁰ ‘*Re X*’, *op cit*, n39. At [7] (Munby P).

¹⁹¹ See *Mennesson v France*, *op cit*, n129. Paragraphs 97 and 98.

¹⁹² [2015] EWHC 2080 (Fam).

¹⁹³ *Ibid*, [12] (Theis J).

as a single person obstructs the birth registration process, and this is contrary to the child's rights under Articles 7 and 8 CRC, and the best interests of the child.¹⁹⁴

(II) Psychological Identity

In addition to legal recognition of the child's relationship with his / her parent(s), a parental order also acknowledges the 'psychological relationship' between the intended parents and child. As Woodhouse observes, children 'identify as their family and draw their own identity from the people who take daily care of them and are their psychological parents'.¹⁹⁵ This was recognised by Munby P in *'Re X'*.¹⁹⁶

'A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *Re J (Adoption: Non-Patril)* [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences."' ¹⁹⁷

Denying children with single parents a parental order ignores how the child draws their own identity from the people who take daily care of them. In *Re G*¹⁹⁸ Baroness Hale famously described that psychological parenthood involves:

'The relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting'.¹⁹⁹

Therefore, the exclusion of single parents from applying for a parental order, undermines the development of this relationship. Despite other orders being available including adoption, wardship and child arrangements, these alternatives distort the

¹⁹⁴ Article 3 CRC.

¹⁹⁵ B Bennett Woodhouse, *op cit*, n21, p127.

¹⁹⁶ *Op cit*, n39.

¹⁹⁷ [54] (Munby P).

¹⁹⁸ [2006] UKHL 43.

¹⁹⁹ [35] (Baroness Hale).

reality that the intended parent is the biological parent of the child. The inability for single parents to apply for a parental order is inconsistent with the Preamble of the CRC which recognises ‘that the child, for the full and harmonious development of his / her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.’ This secure and happy environment is unlikely to be achieved by discriminating against families headed by single parents.

(III) Genetic Identity and Identity of Origin

A parental order is important for two further facets of the child’s identity: genetic identity and ‘identity of origin’.²⁰⁰ In *Re X*, Munby P highlighted that an adoption order would be unsuitable for a surrogacy-conceived child because it would distort the child’s biological link with his father. Related to genetic identity is identity of origin, which Woodhouse²⁰¹ defines as:

‘A right to know and explore, commensurate with her evolving capacity for autonomy, her identity as a member of the family and group into which she was born. The trusteeship model of adult power implies that we adults... have a duty to recognize and protect the child's access to this heritage...’.²⁰²

A parental order allows the child to ‘know and explore’ their identity as a member of the family and group into which he / she was born. The parental order reflects the child’s origins and acknowledges the intention of the surrogate to give the child to the intended parents. It is argued that the child’s right to ‘identity of origin’ is inherent in the CRC (Articles 7 and 8). The former guarantees the child’s right to birth registration, name and nationality and the right to know and be cared for by parents.²⁰³ Article 8 CRC guarantees the right of the child to ‘preserve his or her identity, including nationality, name and family relations.’ The exclusion of children with single parents from ever having a parental order does not protect these rights. Overall, these cases demonstrate that a parental order is important for multiple facets of the

²⁰⁰ B Bennett Woodhouse, *op cit*, n21.

²⁰¹ *Ibid*, p128.

²⁰² *Ibid*.

²⁰³ Chapter 5 argues that the child should have knowledge of all their ‘parents’ including their surrogate, gamete donors and intended parents.

child's identity. Firstly, a parental order recognises the *legal relationship*²⁰⁴ between the child and his / her intended parents. Secondly, a parental order recognises the child's *psychological relationship*²⁰⁵ with his / her intended parents. Thirdly, the order recognises the child's origins²⁰⁶ (i.e. the child was born as a result of a surrogacy arrangement). Finally, if a genetic link exists between one, or both, of the intended parents and the child, the parental order also reflects this *genetic relationship*.²⁰⁷

(IV) Adoption, Wardship and Child Arrangements Orders: Alternative Solutions?

It was argued in the last chapter that an adoption order, a child arrangements order, and wardship are inappropriate for a surrogacy-conceived child. As McK Norrie notes:

‘At first glance, the similarities between the two orders [adoption and parental orders] are striking, and were clearly designed to be so ... The Human Fertilisation and Embryology (Parental Orders) Regulations 2010 apply many of the crucial provisions in the adoption legislation to parental orders ... These provisions ensure that the overall effect of both orders is virtually identical: a radical transference not only of the responsibility and right to bring up the child, but also of parenthood itself from one set of parents (commonly called the ‘birth parents’ in adoption and the ‘surrogate mother’ and her partner in surrogacy) to another.’²⁰⁸

However, there are crucial differences between a parental order and adoption order, which make the former more appropriate in the surrogacy context. Firstly, the transfer of parenthood through adoption, ‘is perceived to give the state an interest, manifested in the responsibilities of the local authority’,²⁰⁹ whereas the application for a parental order after surrogacy ... is perceived as more purely a private law process, and subject

²⁰⁴ ‘*A v P*’, *op cit*, n180, [25]-[26] (Theis J); and ‘*Re X*’, *op cit*, n39, [24] (Munby P).

²⁰⁵ ‘*Re X*’, *op cit*, n39, [54] (Munby P).

²⁰⁶ *Ibid*.

²⁰⁷ *Ibid*.

²⁰⁸ K McK Norrie, ‘English and Scottish adoption orders and British parental orders after surrogacy: welfare, competence and judicial legislation’, [2017] *Child and Family Law Quarterly*, Volume 29 (1), p3.

²⁰⁹ *Ibid*, p4.

therefore to far less state oversight'.²¹⁰ Secondly, a parental order reflects how the child was born, represents the story of his / her conception and reflects the biological link the child has with at least one of the intended parents. In *AB & CD*²¹¹ Theis J stated that:

‘A parental order and the consequences that flow from it are, from a welfare perspective, far more suited to surrogacy situations ... Put simply, they are a more honest order which reflects the reality of what was intended, the lineage connection that already exists and more accurately reflects the child’s identity. An adoption order in these situations leaves open the risk of a fiction regarding identity that may need to be resolved by the child later in life. The effect of an adoption order according to s 67 (1) ACA 2002 of treating the child ‘as if’ the child is born as a child of the adopter or adopters is not the reality; the child is born with a biological connection to one of the applicants.’²¹²

Moreover, the purpose of a parental order is to transfer parenthood from the legal mother – the surrogate – who never intended to have a rearing role, to those who were always intended to act as parents (i.e. the intended parents). As McK Norrie observes, ‘the making of an adoption order will never have been the intent with which the subject of an adoption application was conceived. Intent is thereby revealed as one of the major points of distinction between the two orders’.²¹³ Given the differences between parental and adoption orders, it is suggested that the judiciary fail to adopt a children’s rights approach when they award the latter to a surrogacy-conceived child.

In *B v C*²¹⁴ the court highlighted that the child’s life-long welfare was their paramount consideration and that an adoption order would be the most appropriate because it would afford the father the overall parental rights and responsibility and provide permanence for the child in accordance with the family wishes.²¹⁵ Applying Tobin’s

²¹⁰ *Ibid.*

²¹¹ [2015] EWFC 12.

²¹² [71] (Theis J).

²¹³ *Op cit*, n208, pp9-10.

²¹⁴ *Op cit*, n18.

²¹⁵ [35] Theis J endorsing the views of the social worker.

model, it is suggested that this solution adopts a selective, rather than ‘substantive’, children’s rights approach. The judgment makes significant references to the child’s life-long welfare and how an adoption order could provide ‘legal security to the child’s relationship with his father’,²¹⁶ however, it ignores the disadvantages with awarding an adoption order to a surrogacy-conceived child. It is recalled that in *A v P* which was published four years before *B v C*, Theis J set out the disadvantages with applying for an adoption order in a surrogacy case. In addition to the ‘practical impediments’,²¹⁷ adoption would have a ‘distorting effect’:

‘In the absence of a parental order a legal relationship between Mrs A [the intended mother] and B [the child] could be created by way of a residence order or a special guardianship order. However these orders would not negate the legal relationship between the child and the surrogate mother and father under English law and only last during the child’s minority.’²¹⁸

Theis J was clear that the recognition of a relationship between the child and his / her intended parents, ‘cannot be developed by any other route’.²¹⁹ Therefore, it is surprising that the judgment in *B v C* is not critical of giving an adoption order to a surrogacy-conceived child. An adoption order, in these circumstances, overlooks the child’s identity as B’s biological child, the child’s ‘identity of origin’²²⁰ as a surrogacy-conceived (not adopted) child, and the child’s psychological relationship with his intended father. As such, *B v C* has not only compounded the discrimination faced by children with single parents by maintaining that adoption is an adequate solution but fails to expose how adoption does not safeguard the identity of surrogacy-conceived children.

An adoption order also ignores the contact many surrogacy-conceived children have with their surrogate. Compared to a parental order, an adoption order is arguably more

²¹⁶ [37] (Theis J).

²¹⁷ [7] (Theis J).

²¹⁸[9] (Theis J).

²¹⁹[8] (Theis J).

²²⁰ B Bennett Woodhouse, *op cit*, n21.

drastic for the child and their identity. According to Baroness Hale in *Re P*,²²¹ an adoption order does more than deprive the child's birth parents of their parental responsibility for bringing up the child:

‘It severs, irrevocably and for all time, the legal relationship between a child and her family of birth. It creates, irrevocably and for all time (unless the child is later adopted again into another family), a new legal relationship, not only between the child and her adoptive parents, but between the child and each of her adoptive parent’s families...’²²²

The government's policy aim has been to ‘reduce the scope for postadoption contact between adopted children and their birth families’.²²³ An adoption order, which severs the legal relationship between a child and her birth family, is inappropriate in the surrogacy context where many intended parents choose to remain friends with the surrogate, who can have a continuing role in the child's life.²²⁴ There is no legal obligation upon the intended parents to tell the child about the surrogate, or remain in contact with the surrogate. However, compared to adoption, surrogacy gives more scope for the child to remain in touch with their birth ‘parent’. Although there is little empirical evidence available about long-term contact and relationships between surrogates and surrogacy families, Imrie and Jadvá reported that ‘most surrogates and surrogacy families have been found to remain in contact in the short-term in studies of UK and US-based surrogates’.²²⁵ This was also found by Blyth,²²⁶ Braverman and

²²¹ [2008] UKHL 38.

²²² [85] (Baroness Hale).

²²³ B Sloan, ‘Post-Adoption Contact Reform: Compounding The State-Ordered Termination Of Parenthood?’ *Cambridge Law Journal*, 73(2), July 2014, pp. 378–404, p379.

²²⁴ See chapter 4 which discusses the friendships formed between some of the intended parents and surrogates interviewed for this project.

²²⁵ S Imrie and V Jadvá, ‘The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements’, *Reproductive BioMedicine Online* (2014) 29, 424–435. P 425.

²²⁶ E Blyth, “‘I wanted to be interesting. I wanted to be able to say ‘I’ve done something interesting with my life’”: Interviews with surrogate mothers in Britain’, *Journal of Reproductive and Infant Psychology*, 1994, 12:3, <https://doi.org/10.1080/02646839408408885>.

Corson²²⁷ and Jadvā.²²⁸ Imrie and Jadvā also reported that although the level of contact varied greatly, ‘one study of 34 UK surrogates found that surrogates maintained contact with 79% of couples and 76% of children 1 year after the birth of the child.’²²⁹ Given the scope for surrogacy-conceived children to remain in contact with their surrogate, adoption is an inappropriate alternative.

Another judicial solution has been to award a child Arrangements Order, as was the case in ‘*Re A*’²³⁰ which was discussed in the previous chapter. Theis J stated that a Child Arrangements Order would ensure the father had parental responsibility for the child, so that he ‘is able to take all steps that are necessary to be able to meet the day to day welfare needs of A.’²³¹ In this respect, the order allows the father to fulfil the child’s psychological need for a parent and his physical needs. Theis J suggested that the order would also provide ‘clarity in relation to his [the father’s] legal status and position in relation to A.’²³² This may be true, but only as a temporary solution. Although Theis J was in an unenviable position given that the alternative was to leave the intended father without parental responsibility, it is disappointing that she did not express her discontent with this solution. The Child Arrangements Order does not make the father a legal parent which undermines his genetic connection with the child and conceals the child’s identity as a surrogacy-conceived child.

The judiciary’s decision to make a surrogacy-conceived child a Ward of Court in several cases is also an inadequate solution for the surrogacy-conceived child’s identity. *M v F & SM*²³³ concerned a child (A), who was born as a result of a surrogacy arrangement in the UK. M (intended mother) and F (intended father) were the

²²⁷ A Braverman and S L Corson, ‘A Comparison of Oocyte Donors’ and Gestational Carriers/Surrogates’ Attitudes Towards Third Party Reproduction’ *Journal of Assisted Reproduction and Genetics*, 2002, 19:10, pp462-469.

²²⁸ V Jadvā, C Murray, E Lycett, F MacCallum and S Golombok, ‘Surrogacy: the experiences of surrogate mothers’, *Human Reproduction*, 2003, 18:10, p 2196-2204.

²²⁹ *Op cit*, n225.

²³⁰ *Op cit*, n19.

²³¹ [8] (Theis J).

²³² [8] (Theis J).

²³³ *M v F & SM*, *op cit*, n20.

biological parents. F and the surrogate (SM) were the legal parents of the child.²³⁴ Whilst the surrogate (SM) was pregnant, the relationship between the intended parents ended, and F decided that he did not want to have any involvement with the child. Since the child's birth the surrogate surrendered his care to the intended mother (M). The surrogate had 'no wish to be involved in the upbringing of the child and would be content for a parental order to be made in favour of the applicant if that route was in law available to her'.²³⁵ Keehan J noted that F (the intended father), 'played no role whatsoever in A's life. He has not seen him. As noted above he does not wish to be involved in his child's upbringing'.²³⁶ As a single applicant, M could not apply for a parental order in respect of A. Therefore, the surrogate and F remained the legal parents of A. To provide stability for the child and some legal status for the intended mother, the child was made a Ward of Court on 28 February 2017. Care and control of him was granted to the intended mother, and F was prohibited from removing the child from her care.²³⁷ Making the child a ward of court, rather than awarding a parental order, is an unsatisfactory outcome for the child and his mother. Wardship means that M is unable to make important changes to the child's education, residence, whereabouts, name, or consent to more significant forms of medical treatment, without prior permission from the court. This is a severe restriction on the mother and child's right to private and family life (Article 8 ECHR) and this situation would not happen to a two-parent surrogacy family. Overall, children with single parents should not be:

'Compelled to make do with legal solutions – adoption orders or child arrangements orders – which do not provide the optimum legal and psychological solution for, and thus do not promote the best interests of, a child born of a surrogacy arrangement'.²³⁸

Reforms must be undertaken to remove the relationship provisions from the 2008 Act, so that the children of single parents, and platonic co-parents, are not subject to orders that do not reflect the reality of how they were born. To use the language adopted by

²³⁴ Section 33 HFEA 2008 assigns legal motherhood to the surrogate. The intended father had legal parenthood because the surrogate was unmarried, (section 36 HFEA 2008).

²³⁵ [10] (Keehan J).

²³⁶ [11] (Keehan J).

²³⁷ [4] (Keehan J).

²³⁸ [21] (Munby P).

Professor Michael Freeman, giving a surrogacy-conceived child an adoption or a child arrangement order, or making them a Ward of Court, ‘deceives the child of their true origins’.²³⁹

3.5 Conclusion

This chapter demonstrates that the exclusion of single people from applying for a parental order, interferes with the rights of the child, most notably the right to non-discrimination, the right to private and family life and the right to identity. The first part challenged the government’s assumption that only a couple are equipped to deal with surrogacy, using Golombok’s studies on solo-mothers of choice with donor conceived children.²⁴⁰ It is acknowledged that the study is limited for the purposes of this chapter because it focuses on single motherhood in the context of donor conceived children, not surrogacy. However, some useful links were still identified. Firstly, like single mothers using donor conception, single parents using surrogacy make an active decision to parent alone and thus differ from those who unintentionally find themselves in that situation (e.g. due to unplanned pregnancy or marital breakdown). Like solo mothers using donors, single parents entering into surrogacy arrangements have not experienced the problems associated with marital breakdown or unplanned single parenthood. Therefore, children born to single parents via surrogacy are also unlikely to encounter the emotional and behavioural problems of children who have experienced the financial hardship and / or conflict between parents following divorce or unplanned pregnancies. It is argued that the government was more concerned with upholding the two-parent ‘sexual family’ rather than making a rigorous best interests assessment to consider the impact of excluding single parents from the HFEA 2008 on the child. The government should have used the evidence available, which challenges the long-standing assumption that children are better off with two parents.

The next part of the chapter demonstrated that the relationship provisions violate the child’s right to private and family life and non-discrimination. Although Munby P

²³⁹ M Freeman, ‘The new birth right? Identity and the child of the reproduction revolution’, *The international Journal of Children's Rights* 4: 273-297, 1996, p291.

²⁴⁰ S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, *op cit*, n53.

issued a declaration of incompatibility in '*Z (A Child) (No. 2)*' this was not a victory for promoting the rights of surrogacy-conceived children. An application of the key tenets of a child rights-based approach revealed that the judgment did not conceptualise the issues in terms of the child's right to non-discrimination and failed to utilise the CRC which was particularly relevant to Z's plight. As such, reforms must take the judgment further and really centralise these rights in new surrogacy regulation.

A parental order presents the 'optimum legal and psychological solution'²⁴¹ for the surrogacy-conceived child. A parental order is preferable to an adoption order, because 'it confirms the important legal, practical and psychological reality of the child's identity'.²⁴² The final part of the chapter demonstrated that denying the child a parental order based on the relationship status of his / her parent(s) is contrary to the child's right to identity in terms of their legal and psychological relationships with their parents, genetic identity, and identity of origin. Adoption orders, wardship and child arrangements orders do not reflect the child's identity as a *surrogacy-conceived* child. The importance of a parental order for the intended parent's ability to consent to medical treatment (as compared to Wardship which restricts the intended parents ability to do this)²⁴³ also highlights how a parental order should be awarded to the intended much sooner.²⁴⁴

Considering the evidence presented in this chapter, the relationship provisions should be urgently removed. Policy-makers should consider moving away from an approach that prioritises family structure over the 'actual contingencies of care-taking relationships'.²⁴⁵ This would allow a more diverse range of intended parents to apply for a parental order following surrogacy, thus protecting the child's rights to identity,

²⁴¹ '*Re X*', *op cit*, n39, [7] (Munby P).

²⁴² *Ibid.*

²⁴³ See *M v F & SM*, *op cit*, n20.

²⁴⁴ Currently, the intended parents cannot apply for a parental order until at least six weeks after the child's birth, which means the intended parents are not recognised as the child's legal parents until a long time after the child is born. The possibility of granting a parental order sooner is discussed in chapter 5.

²⁴⁵ M Fineman, *op cit*, n49.

private and family life, and non-discrimination which are protected by the ECHR and CRC.

4. Do the Procreative Rights of ‘Doubly Infertile’ Intended Parent(s) Demand the Removal of the ‘Genetic’ Requirement?

4. 1 Introduction

As Diduck laments, ‘the pervasive, and at times misplaced, emphasis on genetics is driving a [biologically] unbalanced overly genetic view of parenthood’.¹ Surrogacy has traditionally been viewed as a solution for infertile couples to have a genetically related child. The *Warnock Committee*² recognised that surrogacy ‘offers to some couples their only chance of having a child genetically related to one or both of them’.³ In 1998, the *Brazier Review*⁴ rejected ‘cases of pre-conceptual arrangements where a surrogate agrees to carry a child unrelated to either of the commissioning couple’.⁵ The European Court’s judgment in *Paradiso and Campanelli*⁶ perpetuates the view that surrogacy is a purely genetic endeavour. Unsurprisingly, the genetic view of surrogacy is entrenched in UK legislation. Section 54(1)(b) of the HFEA 2008, provides that one of the prerequisite’s to applying for legal parentage and a parental order is that ‘the gametes of at least one of the applicants were used to bring about the creation of the embryo...’. Where neither intended parent has contributed their gametes to the creation of the embryo, that couple cannot apply for a parental order.

¹ A Diduck, ‘If only we can find the appropriate terms to use the issue will be solved’: Law, identity and parenthood’, *Child and Family Law Quarterly*, Vol 19, No 4, 2007, p470.

² M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter ‘*The Warnock Report*’.

³ *Ibid*, 8.13.

⁴ Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, Cm 4068 (1998) – hereafter ‘*The Brazier Review*’.

⁵ *Ibid*, 7.24.

⁶ *Paradiso and Campanelli* Appl no. 25358/12 (ECtHR, 2nd Section, 27th January 2015); and *Paradiso and Campanelli v Italy* Appl no. 25358/12 (ECtHR, Grand Chamber 24 January 2017).

In the UK, the genetic requirement and its implications for procreative rights have been ignored from academic debates, judicial scrutiny and the reform agenda. In 2016, the genetic requirement was mentioned fleetingly in the *Myth Busting Report*,⁷ which briefly explained that the rationale for the requirement:

‘Is presumably to ‘legitimise’ the relationship and in some way to prevent and protect women and their husbands/partners being pressured into ... conceiving babies purely with the aim of giving them away.’⁸

The 2016 Report is a missed opportunity for delving further into the requirement. This chapter, which consists of three substantive sections, aims to expose the problems with the genetic requirement and explore why it is contrary to Articles 8 and 14 of the ECHR. The first section explores the three forms of parenthood enunciated by Baroness Hale in *Re G*,⁹ genetic, gestational and social / psychological. There are some parents who use surrogacy because they cannot carry a pregnancy to term, nor contribute their eggs or sperm to the creation of the embryo. For example, women with Mayer Rokitansky Kuster Hauser syndrome (MRKH) are born without a vagina, cervix and uterus and are unable to become pregnant.¹⁰ Furthermore, cancer treatments including chemotherapy, radiotherapy, surgery and hormonal therapy can affect the eggs in the ovaries, the pituitary gland and hormone production, and the womb, cervix and ovaries.¹¹ Parents who cannot conceive and carry a pregnancy to term are ‘doubly-infertile’ (which is also referred to throughout as conception and pregnancy infertile).¹² The second part of the chapter considers how ‘doubly-infertile’ intended parents are marginalised by the genetic requirement and examines: (1) the judiciary’s

⁷ ‘Surrogacy in the UK: Myth busting and reform’, *Report of the Surrogacy UK Working Group on Surrogacy Law Reform*, (November 2015): <<https://www.kent.ac.uk/law/research/projects/current/surrogacy/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf>> (last accessed 13/04/18).

⁸ *Ibid*, 4.4, p33.

⁹ *Re G* [2006] UKHL 43, [33]-[36].

¹⁰ <https://www.mrkh.org.uk/mrkh.html> (last accessed 28/08/18).

¹¹ <https://www.macmillan.org.uk/information-and-support/coping/side-effects-and-symptoms/fertility-in-women/how-treatment-can-affect-fertility.html> (last accessed 28/08/18).

¹² A person who is ‘conception’ and ‘pregnancy’ infertile is referred to as ‘doubly-infertile’.

language when discussing genetic and non-genetic parents; and, (2) how non-genetic parents are treated when the surrogacy arrangement does not go to plan.

The next part of the chapter explores two cases to see whether section 54(1)(b) HFEA 2008 violates Articles 8 and 14 ECHR. The first judgment is *Paradiso and Campanelli*¹³ which was subsequently overturned by the Grand Chamber. The second judgment is *AB and Another*,¹⁴ which was handed down by the High Court of South Africa and subsequently overturned by the Constitutional Court.¹⁵ Both cases involved parents who had a genetically unrelated child through surrogacy. The judgments are used to explore how the law responds to claims of parenthood when there is no genetic connection. It is considered whether: (1) the genetic requirement is contrary to Article 8 ECHR and the meaning of ‘family life’; (2) the genetic requirement discriminates against a specific subclass of infertile people (those who are both pregnancy and conception infertile); and (3) the genetic requirement discriminates between surrogacy and IVF.

The final part of the chapter critiques the argument that the genetic requirement is justified because doubly-infertile intended parents can ‘adopt instead’. Although adoption results in the same outcome as non-genetic surrogacy (adults become the parents of a child to whom they are not genetically related), empirical work carried out for this thesis, demonstrates how the processes involved in adoption and surrogacy are fundamentally different, which also resonates with the findings in pre-existing studies.¹⁶ As such, it is questioned whether Robertson’s¹⁷ procreative liberty

¹³ *Op cit*, n6.

¹⁴ *AB v Minister of Social Development As Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580; 2016 2 SA 27; [2015] 4 All SA 24. Hereafter ‘*AB v Minister of Social Development (HC)*’.

¹⁵ *AB and Another v Minister of Social Development* [2016] ZACC 43. Hereafter ‘*AB and Another (CC)*’.

¹⁶ V Jadvā, C Murray, E Lycett, F MacCallum and S Golombok, ‘Surrogacy: the experience of surrogate mothers’, *Human Reproduction* Vol.18, No.10 pp.2196-2204, 2003.

¹⁷ J. A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies*, 291pp, Princeton University Press (1996).

framework should be extended to parents raising children to whom they are genetically unrelated.¹⁸

4.2 Exploring the Genetic View of Surrogacy Imposed by UK Law and Policy-Makers

In *Children of Choice*,¹⁹ Robertson argues that the ability to procreate genetically related offspring, experience gestation and parent one's child, are activities that should have presumptive primacy.²⁰ He suggests that some activities seem so closely associated with, or essential to, reproductive decisions that they should be considered part of it and uses the example of a woman's need to acquire and then use genomic information about herself, her partner, her gametes, her embryos, or her foetus before deciding whether to reproduce.²¹ Because this information will determine whether a person or couple will reproduce, freedom to acquire and use it would seem to be part of procreative liberty.²² In contrast, Robertson suggests that adopting a child or rearing children not related by genetic kinship, are activities that do not fall within the scope of 'procreative rights' because these activities arise after reproduction has already occurred.²³ He explains, 'a right to gestate as part of procreative liberty is coherent only when it is integrally related to the gestator's own genetic reproduction.'²⁴ Furthermore, Robertson agrees that a 'robust conception of procreative liberty should extend to gestational surrogacy'²⁵ but only because it 'is essential for genetic

¹⁸ J Robertson's procreative liberty framework only applies to genetic reproduction. For criticism of this see A Alghrani 'Uterus transplantation in and beyond cisgender women: revisiting procreative liberty in light of emerging reproductive technologies', *Journal of Law and the Biosciences*, lsy012, <https://doi.org/10.1093/jlb/lxy012>.

¹⁹ J. A. Robertson, *op cit*, n17.

²⁰ *Ibid*, pp24-25.

²¹ J. A. Robertson, 'Procreative Liberty in the Era of Genomics', *American Journal of Law & Medicine*, 29 (2003): 439-87, p448.

²² *Ibid*.

²³ *Ibid*.

²⁴ Professor J. A. Robertson, 'Is there a right to gestate?' 2017, *Journal of Law and the Biosciences*, 1-7 doi:10.1093/jlb/lxx010. At p 6.

²⁵ *Ibid*, p3.

reproduction when a woman is unfit or unable to gestate'.²⁶ As such, he limits procreative liberty to activities that involve procreating genetically related offspring (e.g. gestational surrogacy where the intended mother's eggs are used).²⁷

This genetic understanding of procreative liberty is evident within the HFEA 2008, which provides that only two people can apply for a parental order, one of whom must have a genetic connection to the child.²⁸ Like the 'relationship provisions' discussed in the previous chapters, it is argued that the genetic requirement entrenches the 'sexual family',²⁹ by denying non-genetic couples a parental order. This genetic view of surrogacy can be traced to the *Warnock Report* and *Brazier Review*. The *Warnock Report* stated that 'surrogacy must not be ruled out, since it offers to some couples their only chance of having a child genetically related to one or both of them.'³⁰ Section 30(1)(b) of the HFEA 1990 stated that 'the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo', thus confining surrogacy to those able to contribute their gametes to the creation of the child.

In 1998, The *Brazier Review* also perceived surrogacy as a solution for infertile couples to have a genetically related child. It noted that 'for a parental order to be granted in accordance with section 30 of the 1990 Act ... a woman undertakes to bear a child who is genetically related to at least one of the commissioning couple'.³¹ The Review recognised that there had been occasions where Guardians had doubts about whether a genetic relationship to the child exists.³² The *Brazier Review* was concerned that women 'who are already pregnant may be persuaded to agree to give up the child

²⁶ *Ibid.*

²⁷ With gestational surrogacy, donor eggs or the intended mother's eggs are used to create the child. The surrogate does not use her own eggs and is genetically unrelated to the baby.

²⁸ Section 54(1)(b) HFEA 2008.

²⁹ M Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge: New York and London, 1995), p143.

³⁰ *Warnock Report, op cit*, n2, 8.13.

³¹ *Brazier Review, op cit*, n4, 7.24.

³² *Ibid.*

at birth under the cover of an assumed surrogacy arrangement.’³³ Furthermore, The *Brazier Review* objected to:

‘... cases of pre-conceptual arrangements where a surrogate agrees to carry a child unrelated to either of the commissioning couple i.e. an embryo created by donor gametes. In such a case there would currently be no eligibility for a parental order nor do we judge that there should be.’³⁴

The Review considered that non-genetic surrogacy amounted to pre-natal adoption and that ‘surrogacy must not become a device by which to evade adoption laws’.³⁵ To ensure that surrogacy was restricted to those where at least one intended parent contributes their gametes to the creation of the child, the *Brazier Review* recommended that judges should be able to order DNA tests to establish that a genetic link exists between the child and at least one of their intended parents.³⁶ Brazier’s recommendation for DNA testing was not adopted by the HFEA 2008 and there is no statutory requirement for intended parents to prove that at least one of the applicant’s contributed their gametes to the creation of the child.

In some of the parental order applications decided in the UK, the judiciary have demonstrated a willingness to accept, at face value, that section 54(1)(b) has been satisfied. This is evident in *D and L (Minors) (Surrogacy)*,³⁷ which concerned a surrogacy arrangement entered into by a male same-sex couple using a clinic in India. Baker J rejected a suggestion to direct DNA testing to establish that the first Applicant was the genetic father of the twins. He stated:

‘I have given careful consideration to this suggestion but reached a clear conclusion, without requiring DNA evidence, that I am satisfied on the evidence that the clinic’s account of the circumstances of the twin’s birth is true, that the children were carried

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *In the Matter of D and L (Minors) (Surrogacy) And in The Matter of Human Fertilisation And Embryology Act 2008* [2012] EWHC 2631. Hereafter ‘*D and L*’.

by Miss B, that the first Applicant is their father, and that the provisions of section 54 (1) are satisfied.’³⁸

Again, in *Re C a child*³⁹ the criteria in section 54(1)(b) was dealt with quickly. A letter from the applicant’s doctor confirmed ‘A’s genetic connection to C’ and that the embryo was ‘created using the gametes of A.’⁴⁰ It is unclear whether this genetic connection was confirmed by DNA testing. Similarly, in *WT*⁴¹ it was accepted that the embryo was created with the intended father’s gametes and an egg from an anonymous egg donor. No DNA evidence was obtained and instead, Theis J relied on documentation from the Clinic which confirmed the biological connection between KR and WT.⁴² Theis J stated that his biological connection ‘clearly manifests KR’s ethnicity which I accept as part of the evidential picture in being satisfied that this criteria is met (s54(1))’.⁴³ These cases suggest that section 54(1)(b) is not necessarily enforced or checked.⁴⁴

Since the genetic requirement is not always checked, and intended parents do not need to apply for a parental order, doubly-infertile intended parents could enter into a surrogacy arrangement regardless and not disclose that neither parent has a genetic connection to the child. This could create an environment of secrecy which is not in the best interests of the child, an argument that is returned to in the following chapter. Since Warnock and Brazier, the predominant view that surrogacy is a solution to have a genetic child has shifted. The intended parents interviewed for this project either disagreed with the genetic requirement provision altogether or believed that the issue needed to be debated more. When asked about the genetic requirement one intended mother interviewed for this project, Sophie, said:

³⁸ [24] (Baker J).

³⁹ [2013] EWHC 2408 (Fam).

⁴⁰ [5] (Theis J).

⁴¹ [2014] EWHC 1303 (Fam).

⁴² [24] (Theis J).

⁴³ *Ibid.*

⁴⁴ Where DNA testing has been used, it has usually arisen in international commercial surrogacy cases. In *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), DNA testing was needed to prove to the immigration authorities that one of the male applicants was the biological father of the children. See para [10] (Hedley J).

‘It’s just so difficult and so tragic when there’s people who happen to have problems at both ends and then you know they’ve got no options to have children... I do feel there is a level of unfairness in the law that does need more thought.’⁴⁵

The implications of the genetic requirement for doubly-infertile intended parents, and the message this creates for how the law values social / psychological parenthood, are now discussed.

(I) Does the Genetic View of Surrogacy Marginalise Other Types of Parenthood?

The South African High Court identified two types of infertility in *‘AB v Minister of Social Development (HC)’*.⁴⁶ The first, is ‘conception infertility’, which is the inability to contribute one’s own gametes to the creation of an embryo. In respect of the first type, ‘conception infertility’, the judgment observed two causes. Firstly, there are individuals who ‘may elect not to use their own gametes (although they are able to do so) and intend to use both male and female donor gametes’.⁴⁷ Typically these individuals use donors to prevent their prospective child from inheriting a ‘disease or disability of which members of the class are likely genetic carriers’.⁴⁸ Secondly, the South African High Court also identified ‘those who are biologically unable to contribute their own gametes to conception or are not involved in a sexual relationship with a person who is able to make such contribution’.⁴⁹

The South African High Court also identified a second type of infertility, ‘pregnancy-infertility’, which refers to the inability of a woman to procure implantation or to carry a pregnancy to full term.⁵⁰ Where a woman is ‘conception infertile’, but can become pregnant, she has recourse to IVF where she can use donor eggs and/ or sperm. By contrast, where a woman is both pregnancy and conception infertile, her only option

⁴⁵ Interview 02IM, recorded on 09/07/16 (on file with the author).

⁴⁶ *Op cit*, n14.

⁴⁷ [26] (Basson J).

⁴⁸ *Ibid*.

⁴⁹ [27] (Basson J).

⁵⁰ [28] (Basson J).

is surrogacy using donated gametes. However, in the UK a doubly-infertile couple cannot apply for a section 54 parental order because neither intended parent has contributed a gamete to the creation of the embryo. In the South African case, the claimant ‘AB’ fell into this sub-class: she was both pregnancy and conception infertile. Whilst she qualified for surrogacy on the basis of being pregnancy-infertile, ‘she was effectively disqualified from using surrogacy because she was also conception-infertile and therefore unable to establish a genetic link with a prospective child’.⁵¹

It is suggested that section 54 interferes with the procreative choices of couples / individuals who are conception and pregnancy infertile. Their inability to apply for a parental order is contrary to the three-fold conception of parenthood set out by Baroness Hale in *Re G*,⁵² where she explained that there are:

‘At least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case’.⁵³

The first is genetic parenthood and the second is gestational. Genetic and gestational parenthood does not adequately describe parents who are pregnancy infertile and / or conception infertile. Consequently, Baroness Hale acknowledged the importance of ‘social and psychological’ parenthood. Adopting Goldstein *at al.*, Baroness Hale stated that social and psychological parenthood involves:

‘The relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting’.⁵⁴

Whereas ‘in the great majority of cases, the natural mother combines all three’,⁵⁵ Baroness Hale recognised that there are also parents, including those using surrogacy,

⁵¹ [29] (Basson J).

⁵² *Op cit*, n9.

⁵³ [33] (Baroness Hale).

⁵⁴ [35] (Baroness Hale).

⁵⁵ [36] (Baroness Hale).

‘who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare’.⁵⁶ Baroness Hale’s speech confirms that the non-genetic intended parent using surrogacy should also be regarded as a natural parent.

The current emphasis on genetics in section 54(1)(b) HFEA 2008 could result in the non-genetic parent being marginalised where the other intended parent *is* conception-fertile and has contributed their sperm/eggs to the embryo. In the Court of Appeal’s judgment, *CG v CW & G (Children)*⁵⁷ which concerned an appeal by the biological mother against an order granting her lesbian partner’s application to be the primary carer for their two children, Thorpe LJ doubted that a distinction between a biological and non-biological parent would be made in a case concerning a family formed with the use of donated gametes.⁵⁸ Thorpe LJ stated:

‘Again, in the case of the male homosexual couple who enter into a surrogacy agreement in order to parent, I do not consider that a decisive distinction is to be drawn subsequently on the basis that one of the contenders for care supplied the sperm.’⁵⁹

However, the fact that the HFEA 2008 only allows a non-genetic parent to apply for a parental order if his / her partner has a genetic link to the child, suggests that a distinction has already been drawn between a biological intended parent and non-biological intended parent. The non-genetic parent is marginalised from the very start because it is only by virtue of his / her partner that they can apply for a parental order.

The marginalisation, or differential treatment of the non-genetic parent, is apparent in the language used by the judiciary in parental order application cases. In *Re F & M*,⁶⁰ a case discussed in the previous chapters on the ‘relationship provisions’, P and B entered into a surrogacy arrangement with a surrogate in Thailand. An embryo was implanted into the surrogate, P’s sperm having been fertilised with eggs from an

⁵⁶ [37] (Baroness Hale).

⁵⁷ [2006] EWCA Civ 372.

⁵⁸ [41] (Thorpe LJ).

⁵⁹ [42] (Thorpe LJ).

⁶⁰ *Re F & M (Children) (Thai Surrogacy) (Enduring family relationship)* [2016] EWHC 1594 (Fam).

anonymous donor.⁶¹ As such, P was the children's biological father and B was the second non-biological intended parent. When the couple applied for a parental order, the judgment acknowledged the parental role played by the couple. The twins had been cared for by the applicants since they were born and for the first ten days of their lives the intended parents visited the babies on a daily basis in hospital.⁶² After that they cared for them in Thailand until the children returned with the intended parents to the UK on 22 March 2015 on British passports.⁶³ The Parental Order Reporter advised that a parental order should be made because the children 'are much loved and well cared for children, who demonstrated an attachment to both [P] and [B].'⁶⁴

However, despite the shared parenting role performed by P and B, it is suggested that the judgment subtly attaches more importance to P's biological role:

'It is clearly in F and M's welfare interests for the court to make s.54 Parental Orders. The applicants have a relationship with the children as their parents (P is their biological as well as their physiological and emotional parent) and it is necessary to make the parental orders to give legal effect and recognition to the children's identities'.⁶⁵

The special attention paid to P's two categories of parenthood (biological and emotional / social) suggests that there is an implicit hierarchy of parenthood, whereby the parent who satisfies genetic or gestational parenthood is perceived to be superior to the 'psychological' or 'social' parent. It is disappointing that *Re F & M* did not pay special attention to B's psychological and social parenthood, and the value this would also bring to the children's identities. The judgment fails to recognise Thorpe LJ's comments in *CG v CW & G (Children)*,⁶⁶ where he stated that where the care of the

⁶¹ [3] (Russell J).

⁶² [7] (Russell J).

⁶³ [7] (Russell J).

⁶⁴ [7] (Russell J).

⁶⁵ [47] (Russell J).

⁶⁶ *Op cit*, n57.

new born and developing baby is shared, the children will not distinguish between one parent and the other on the grounds of biological relationship.⁶⁷

In the event of a dispute between two intended parents, or the intended parents and the surrogate, Lord Nicholls' suggestion in *Re G*⁶⁸ that 'a child should not be removed from the primary care of his or her biological parents without compelling reason'⁶⁹ raises uncertainty for the non-genetic intended parent. In *CW v NT and another*,⁷⁰ the child's biological intended father applied for a residence order. The parties had entered into a surrogacy agreement, but following the birth of the child, the surrogate refused to hand her over. The child's welfare required that she remain with the surrogate. Baker J was satisfied that the surrogate 'would foster contact and a close relationship between the child and her father'.⁷¹ Presumably, the child would also be spending time with the intended mother whilst in the care of her biological father, yet the judgment did not mention the surrogate's need to foster a relationship between the child and Mrs W (the intended mother), thereby failing to acknowledge Mrs W's role as a social parent. The judgment reveals another problem with the HFEA 2008's current definition of parenthood. The surrogate is referred to as 'the mother' throughout the judgment because according to section 33 HFEA 2008, the child's legal mother is the gestational parent. This leaves no room for Mrs W's role to develop as the child's psychological parent. When a dispute arises, the legislation should not marginalise the parent without a genetic and gestational claim. Mrs W was responsible for instigating the surrogacy arrangement and planned to raise the resulting child. The subsequent breakdown between the intended parents and surrogate should not mean the non-genetic intended parent is excluded from future involvement with the child. The following section considers in more detail whether, and if so how, the genetic requirement violates the Articles 8 and 14 ECHR.

⁶⁷ [44] (Thorpe LJ).

⁶⁸ *Op cit*, n9.

⁶⁹ [2] (Lord Nicholls).

⁷⁰ [2011] EWHC 33.

⁷¹ [73] (Baker J).

4.3 What are the Human Rights Implications of the ‘Genetic Requirement’ for Non-Genetic Intended Parents?

The European Court of Human Rights has confirmed in its previous decisions that ‘family life’, for the purposes of Article 8, does not require a genetic tie. This was confirmed in *X. Y. & Z. v. United Kingdom*,⁷² where it was held that the relationship between a transgender man (X) and his child (Z) born to his female partner (Y) by artificial insemination by donor (AID) amounted to family life within the meaning of Article 8, despite the absence of a genetic link between X and his child. The Court noted that ‘X was involved throughout that [AID] process and has acted as Z’s “father” in every respect since the birth ... In these circumstances, the Court considers that de facto family ties link the three applicants’.⁷³ In *Paradiso and Campanelli*⁷⁴ however, the Grand Chamber found that no family life (*de facto* or otherwise) existed between a child and his genetically unrelated intended parents. The Grand Chamber’s restrictive definition of family life in the case is criticised next, and the implications for non-genetic surrogacy families are discussed.

(I) The Chamber’s Decision in *Paradiso and Campanelli v Italy*

In January 2015, the European Court of Human Rights delivered a judgment concerning a married couple, Ms Paradiso and Mr Campanelli, who were both Italian nationals.⁷⁵ The couple entered into a commercial surrogacy arrangement with a surrogate in Russia and in accordance with Russian law, the intended parents were registered as the child’s legal parents.⁷⁶ In Italy, the intended parents applied for the registration of the birth of their child but their request was refused on the grounds that the birth documents failed to disclose that the child had been born as a result of a surrogacy arrangement.⁷⁷

⁷² Reports 1997-II no. 35 at para. 619, (1997) 24 E.H.R.R. 143.

⁷³ [37].

⁷⁴ *Op cit*, n6.

⁷⁵ *Ibid*.

⁷⁶ [6], [7].

⁷⁷ [10], [12].

It also transpired that Mr Campanelli was not the child's genetic father. The couple believed that Mr Campanelli's genetic material had been transported to Russia, fertilised with donated eggs and transferred to the surrogate. However, DNA testing revealed that Mr Campanelli was not in fact the child's genetic father. This is distinct from a situation where both parties are doubly-infertile (i.e. unable to carry a pregnancy to term or contribute any genetic material). Mr Campanelli could contribute his genetic material, but an error had occurred in the Russian clinic in that his seminal fluid had not been used. As Ms Paradiso was not the child's genetic mother, neither parent had a genetic link to the child. The Italian Youth court decided that the child should be immediately removed from the couple,⁷⁸ not only given the lack of the genetic relationship between the intended parents and the child, but also because of 'doubt on whether they [the intended parents] were genuinely capable of providing emotional and educational support'.⁷⁹

The baby was removed from his intended parent's care and placed in a children's home in a locality unknown to the intended parents.⁸⁰ The applicants were also forbidden from having contact with the child.⁸¹ It is difficult to conceive how this was in the best interests of the child who had been raised by his social parents from the moment of his birth. The baby was then entrusted to foster parents and left without a formal identity.⁸² This had a 'significant impact on administrative matters: it was unclear under what name the child was to be registered for school, for vaccination records, or for residence'.⁸³ The minors' court declared that the intended parents could not adopt the child because they were neither parents nor relatives of the child.⁸⁴ Therefore, the child who had grown up with his social parents for eight months, had his family life disrupted because of the Italian court's narrow, genetic view of parenthood.

⁷⁸ [22].

⁷⁹ [22].

⁸⁰ The children's rights implications of this are critiqued in the following chapter.

⁸¹ [23].

⁸² [33].

⁸³ *Ibid.*

⁸⁴ [30]. The charges under section 72 of Law no. 184/1983 deprived the applicants of the possibility of fostering (*affido*) the child and of adopting him or other minors.

Aggrieved by these events, the intended parents lodged an application with the European Court, relying on Article 8 ECHR. They complained that the refusal to recognise the legal parent-child relationship and the removal of the child from their care violated their right to respect for private and family life.⁸⁵ The Court dismissed the complaint relating to the Italian authorities' refusal to register the child's birth certificate, 'finding that the applicants had not exhausted available domestic remedies'.⁸⁶ Nevertheless, the Court of First Instance upheld the second complaint, the removal of the child from the intended parent's care. It observed that:

“‘Family life’ for the purposes of Article 8 existed between the child and the intended parents of whom neither was the child's genetic parent but who had acted as parents and cared for the child for the first six months of his life’.⁸⁷

In reaching the conclusion that the applicant's Article 8 ECHR right(s) had been violated, 'it took into account the fact that the applicants had shared with the child the first important stages of his young life, and that they had acted as parents towards the child'.⁸⁸ This mirrors Baroness Hale's three-fold conception of parenthood in *Re G* and her endorsement of social and psychological parenthood as a form of natural parenthood. In practice however, the finding did little to protect the couple's right to rear their child – which is a fundamental aspect of procreative liberty according to Robertson⁸⁹ – because the ruling did not oblige the Italian authorities to return the child to the physical care of the intended parents. This is because 'the little boy had undoubtedly developed emotional ties with his foster family' in the meantime.⁹⁰

(II) Consequences of the Grand Chamber's Biological Primacy Approach for Non-Genetic Surrogacy Families?

⁸⁵ [3]

⁸⁶ [62], [90].

⁸⁷ [86], [87].

⁸⁸ [69].

⁸⁹ Nevertheless, Robertson explains that 'reproduction is having or rearing offspring *with one's own genes*'. *Op cit*, n24, p4 (emphasis added).

⁹⁰ [88].

In comparison to the Chamber's judgment, the Grand Chamber found that no 'family life', for the purposes of Article 8 ECHR, existed between the couple and the child. This was despite the fact that 'the child had been born as the result of a serious and duly considered parental project',⁹¹ and had been looked after by the applicants as soon as he was born.⁹² The Grand Chamber refused to find that *de facto* family life existed on the basis that the relationship between the applicants and child was 'tenuous'⁹³ because there was no biological link between the parents and child. This narrow biological view of parenthood completely ignores the social and psychological parental role performed by the applicants: the first applicant, following the child's birth, 'had rapidly taken him into her care and had taken up residence with him in a flat in Moscow, forming strong emotional bonds'.⁹⁴ Moreover, on the child's arrival in Italy he 'lived with the applicants in an environment which, both materially and emotionally, was welcoming, secure and conducive to his harmonious development'.⁹⁵

The Grand Chamber also suggested that no family life existed between the applicants and child, because they had not lived together for a long enough period. This overlooks the fact that the 'abrupt termination of their cohabitation arose solely from the measures taken by the Italian authorities' and not the applicants'.⁹⁶ The Grand Chamber's arbitrary approach to duration is also contrary to the Court's previous decisions in *Moretti and Benedetti v. Italy*⁹⁷ and *Kopf and Liberda v. Austria*,⁹⁸ where family life was held to exist between foster parents who had cared for a child on a temporary basis.⁹⁹ In *Moretti*, the Court attached importance to the fact that 'the child had arrived in the family at the age of one month and that, for nineteen months, the applicants had shared the first important stages of his young life'.¹⁰⁰ The child was

⁹¹ [106].

⁹² [106].

⁹³ [211].

⁹⁴ [106].

⁹⁵ *Ibid.*

⁹⁶ [106].

⁹⁷ No. 16318/07, para [48], 27 April 2010.

⁹⁸ No. 1598/06, para [37], 17 January 2012.

⁹⁹ [149].

¹⁰⁰ *Ibid.*

also well integrated in the family and deeply attached to the applicants and their children.

If these factors were sufficient for ‘*de facto*’ “family ties” in *Moretti*, then surely ‘*de facto*’ family life should have been established in *Paradiso*, where the child had lived with applicants since birth; the family lived together for eight months, including six months in Italy;¹⁰¹ and this period ‘corresponded to the first important stages in the child’s young life’.¹⁰² The applicants had forged close emotional bonds with the child in the first stages of his life, the strength of which was, clear from the report drawn up by the team of social workers.¹⁰³ Moreover, as the dissenting judgment in *Paradiso* recognised, ‘the cohabitation started from the very day the child was born, lasted until the child was removed from the applicants, and would have continued indefinitely if the authorities had not intervened to bring it to an end’.¹⁰⁴ Instead of focusing on the quality of personal ties between the social and psychological parents and child, the Grand Chamber arbitrarily focused on the absence of a biological link and the duration of the cohabitation. The Grand Chamber suggested that duration is worth less in a family with no biological ties and more where at least one of the parents has a genetic connection to the child:

‘It is true that, in the present case, the duration of cohabitation with the child was longer than that in the case of *D. and Others v. Belgium* ... in which the Court held that family life, protected by Article 8, had existed for only two months before the temporary separation of a Belgian couple and a child born in Ukraine to a surrogate mother. In that case, however, there was a biological tie with at least one of the parents and cohabitation had subsequently resumed.’¹⁰⁵

The Grand Chamber should not have held that biological families deserve more protection over non-biological families. Its narrow conception of ‘family life’ is an

¹⁰¹ [106].

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ Joint Dissenting Opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens And Grozev, [4].

¹⁰⁵ [154].

anomaly when viewed alongside the extensive definition given to family life in its previous decisions. As the minority opinion points out:

‘... While biological ties between those who act as parents and a child may be a very important indication of the existence of family life, the absence of such ties does not necessarily mean that there is no family life.’¹⁰⁶

The ECtHR previously accepted in *Nazarenko v. Russia*¹⁰⁷ that the relationship between a man and a child, who had very close personal ties and believed for years that they were father and daughter, until it was eventually revealed that the man was not the child’s biological father, amounted to family life. The minority in *Paradiso* also refer to *Wagner and J.M.W.L. v. Luxembourg*,¹⁰⁸ *Moretti and Benedetti v. Italy*,¹⁰⁹ and *Kopf and Liberda v. Austria*¹¹⁰ which affirm that ‘it is the existence of genuine personal ties that is important, not the existence of biological ties or of a recognised legal tie’.¹¹¹

Mulligan suggests that the Grand Chamber’s decision in *Paradiso* protects ‘the entitlement of Member States to take robust action to deal with an illegal surrogacy arrangement after the child is born’.¹¹² However, this ‘robust action’, including denying recognition of the legal parent-child relationship, ‘seems to be confined to circumstances in which there is no genetic link between the intended parents and the child.’¹¹³ One of the implications of the Grand Chamber’s decision is to project a message across member states that it is legitimate to punish non-genetic intended parents (who circumvent national laws and enter commercial arrangements overseas) by denying a finding of ‘family life’. The Grand Chamber should not have used its

¹⁰⁶ [3] (Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev).

¹⁰⁷ Application No. 39438/13, para [58], ECHR 2015.

¹⁰⁸ Application No. 76240/01, para [117], ECHR 28 June 2007.

¹⁰⁹ Application No. 16318/07, paras [49]-[52], ECHR 27 April 2010.

¹¹⁰ Application No. 1598/06, para [37], ECHR 17 January 2012.

¹¹¹ [3] (Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev).

¹¹² A Mulligan, ‘Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and The Regulation of Surrogacy Arrangements’ *Medical Law Review*, 2018, Vol. 26, No. 3, pp. 449–475.

¹¹³ *Ibid*, p468.

objections to cross-border surrogacy to dictate that only biological surrogacy families deserve Article 8 protection and non-genetic surrogacy families do not. The judgment ultimately makes a distinction between legitimate and illegitimate families, ‘a distinction that was rejected by the Court many years ago’¹¹⁴ in *Marckx v. Belgium*.¹¹⁵ It is argued that section 54(1)(b) makes the same distinction between legitimate and illegitimate families by choosing to exclude doubly-infertile intended parents from applying for a parental order. The decision shows the problems with a narrow view of procreative rights.

4.4 Is the Genetic Requirement Discriminatory? Lessons from South Africa:

It is suggested that the exclusion of doubly-infertile intended parents from applying for a parental order in the UK is also discriminatory. For Article 14 ECHR to apply, the difference in treatment must relate to a substantive Convention right; in this context, Article 8. In 1976, the ECtHR decided in *Kjeldsen, Busk Madsen and Pedersen*,¹¹⁶ that a difference in treatment must be based on ‘a personal characteristic (‘status’) by which persons or groups of persons are distinguishable from each other’.²⁵ It is argued that a person’s fertility is a personal characteristic by which groups of people can be distinguished. In any event, subsequent judgments illustrate that the European Court will render Article 14 applicable to a difference in treatment that is not based on a ‘personal’ characteristic.¹¹⁷

Considering fertility is a personal characteristic, denying a parental order to those who are doubly-infertile and have no genetic connection to their child invokes Article 14 ECHR. In the context of surrogacy, Article 14 has already been invoked in *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)*,¹¹⁸ and *In the Matter of Z (A Child) (No. 2)*,¹¹⁹ which concerned a ‘personal characteristic’ or

¹¹⁴ [4] (Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev).

¹¹⁵ 13 June 1979, para [31], Series A no. 31.

¹¹⁶ *Kjeldsen, Busk Madsen and Pedersen v Denmark* A 23 (1976); 1 EHRR 711.

¹¹⁷ *Fredin (No1) v Sweden* A192 (1991); 13 EHRR 784, at paras [60]-[61].

¹¹⁸ [2015] EWFC 73. Hereafter, ‘*Re Z*’.

¹¹⁹ [2016] EWHC 1191 (Fam). Hereafter, ‘*Z (A Child) (No. 2)*’.

‘status’, namely, the applicant’s relationship status. Article 14 was invoked because the single parent’s Article 8 right had been violated on the basis of a difference in treatment; being single was a status within Article 14. By analogy, it is suggested that infertility (including double-infertility, which is the inability to gestate and contribute gametes) should also be considered a ‘status’ within Article 14 ECHR. The exclusion of non-genetic intended parents operates on the sole basis of the couple’s infertility, as compared to those who can contribute gametes and qualify for a parental order.

A similar argument was made by the South African High Court in *‘AB v Minister of Social Development (HC)’*.¹²⁰ where a corresponding provision was ruled unconstitutional on the grounds that it violated the, ‘applicant’s rights to equality, dignity, reproductive health care, autonomy and privacy’.¹²¹ The Constitutional Court of South Africa was asked to confirm the validity of the High Court’s decision but in a judgment delivered in November 2016, the majority, led by Nkabinde J, refused. Taking a different stance to the High Court, Nkabinde J found the genetic link requirement to be constitutional.¹²² For the purposes of this chapter, the contrasting judgments are extremely insightful and are used to consider whether the UK’s corresponding provision discriminates against doubly-infertile intended parents.

(I) Discrimination against a ‘Subclass’

*‘AB v Minister of Social Development (HC)’*¹²³ and *‘AB and Another (CC)’*,¹²⁴ concerned a woman, AB, who was ‘conception and pregnancy infertile’,¹²⁵ (i.e. doubly-infertile). Between 2001 and 2011 she underwent 18 unsuccessful IVF cycles.¹²⁶ In 2001, AB unsuccessfully attempted to fall pregnant by undergoing two cycles of IVF treatment using her own ova and her then-husband’s sperm.¹²⁷ After the

¹²⁰ *Op cit*, n14, [76].

¹²¹ [8].

¹²² *AB and Another v Minister of Social Development (CC)*, *op cit*, n15.

¹²³ *Op cit*, n14.

¹²⁴ *Op cit*, n15.

¹²⁵ *Ibid*, [4] (Khampepe J).

¹²⁶ [8] (Khampepe J).

¹²⁷ [8] para a (Khampepe J).

second cycle failed, AB's gynaecologist advised her that she could no longer supply her own gametes for the purpose of conceiving a child.¹²⁸ Therefore, AB undertook two further unsuccessful IVF cycles using anonymous donor ova and the sperm of her then-husband.¹²⁹ After 20 years of marriage, AB's relationship with her husband ended in divorce in 2002, but 'this did not weaken her resolve to have a child'.¹³⁰ She used anonymous donor ova as well as donor sperm nine times, on each occasion unsuccessfully.¹³¹ In 2009, AB switched fertility clinics and a further five IVF cycles resulted in AB falling pregnant on two occasions, each time ending in miscarriage.¹³² Following her second miscarriage, AB was informed that the chances of successful conception by way of IVF treatment had become 'highly improbable if not impossible' and that she was 'permanently and irreversibly infertile in two different senses: first, she is unable to contribute her own gametes for conception; and second, she is unable to carry a pregnancy to term'.¹³³ AB looked into surrogacy as a means to have a child and a potential surrogate agreed to act for her.¹³⁴ As a single woman unable to donate her own ova, 'the only way for AB to proceed was to use both donor ova and donor sperm, as she had done over the course of the last 14 of the total of 18 IVF cycles she had undergone'.¹³⁵ However, on consulting an attorney, AB was informed that 'as a single woman incapable of donating a gamete, AB could not legally enter into a surrogacy agreement because of section 294 of the Children's Act'¹³⁶ which sets as a requirement that a genetic link to the intended parent(s) exists.

In light of AB's dilemma, she approached the High Court of South Africa seeking an order declaring section 294 of the Children's Act inconsistent with the Constitution and invalid.¹³⁷ The applicants' successful constitutional challenge in the High Court

¹²⁸ *Ibid.*

¹²⁹ [8] para b (Khampepe J).

¹³⁰ [8] para c (Khampepe J).

¹³¹ *Ibid.*

¹³² [8] para d (Khampepe J).

¹³³ *Ibid.*

¹³⁴ [9] Khampepe J.

¹³⁵ *Ibid.*

¹³⁶ [10] Khampepe J.

¹³⁷ [11] Khampepe J.

was grounded in the assertion that section 294 violated the rule of law, as well as the rights to equality, human dignity, reproductive autonomy, privacy and access to healthcare.¹³⁸ Basson J was of the view that:

‘[T]he genetic requirement in the context of surrogacy infringes on the constitutional right to make decisions concerning reproduction and consequently also constitute a violation of the human dignity of members of a class.’¹³⁹

It can be deduced from the High Court judgment (and the minority judgment from the Constitutional Court) that the provision was unconstitutional on the basis that section 294 of the Children’s Act discriminated against a particular sub-class of infertile people, namely those who are both conception and pregnancy infertile (i.e. ‘doubly-infertile’).¹⁴⁰ Where a woman is both pregnancy and conception infertile, her only option is surrogacy using donated gametes. In the South African case, AB was both pregnancy and conception infertile. Whilst she qualified for surrogacy on the basis of being pregnancy-infertile, ‘she was effectively disqualified from using surrogacy because she was also conception-infertile and therefore unable to establish a genetic link with a prospective child’.¹⁴¹ The High Court held that the differentiation based on the genetic link requirement constitutes discrimination because it has the effect of excluding members of the subclass ‘from accessing surrogate motherhood as a reproductive avenue’.¹⁴² The minority judgment delivered by the South African Constitutional Court similarly found the provision to be discriminatory on the same basis.

It is submitted that the corresponding provision in section 54(1)(b) HFEA 2008, could be in violation of Article 14 ECHR if double-infertility (conception and pregnancy infertility) amounts to a status within the Convention. In the UK, the genetic link requirement has the effect of completely excluding pregnancy and conception infertile

¹³⁸ [12] Khampepe J.

¹³⁹ *Op cit*, n14. [93] Basson J.

¹⁴⁰ [76] Basson J.

¹⁴¹ [29] Basson J.

¹⁴² [76] (Basson J).

people from applying for a parental order, thus dissuading this group of prospective parents from considering surrogacy as a reproductive avenue.

(II) Discrimination between Families Created through IVF and Surrogacy

The genetic relatedness requirement in section 54(1)(b) HFEA 2008 is discriminatory on the additional basis that it differentiates between those unable to contribute a gamete to the conception of a child and intend to use IVF, and those unable to contribute a gamete to the conception of a child and intend to use surrogacy.¹⁴³ Where a couple, or individual, are pregnancy fertile but conception infertile, they can choose to use IVF using a donated embryo. Using donated eggs and / or sperm may be recommended for women with blocked or damaged fallopian tubes, people with unexplained fertility problems, men with low sperm count and older women.¹⁴⁴ Therefore, conception infertile men and women have recourse to double-donation IVF and there is no requirement for either parent to have a genetic link to the child. One intended mother interviewed for this project, Lauren, was also critical of the genetic requirement and noted how the law discriminates between infertile people using IVF and those using surrogacy:

‘I don’t see why you should be discriminated against if you’re doubly-infertile. I think it’s insulting to donor conceived families to assume that if you’ve not got a genetic connection you’re less of a parent to your child. I also think, why should surrogacy be an exception ... if double donation is ok for IVF then why is it not ok for surrogacy?’¹⁴⁵

It has been suggested that requiring a genetic link between parents and child in the case of surrogacy, but not IVF, is justified because with IVF the mother still gestates

¹⁴³ *Op cit*, n15. This argument was made by the Constitutional Court’s minority (Khampepe J) in relation to the South African genetic requirement. Para [98].

¹⁴⁴ See the Human Fertilisation and Embryology Authority’s guidance on IVF: <https://www.hfea.gov.uk/treatments/explore-all-treatments/in-vitro-fertilisation-ivf/> (last accessed 03/04/18).

¹⁴⁵ Interview 07IM, recorded on 15/07/16 (on file with the author).

the child. This argument is evident in the Constitutional Court's majority judgment in *AB and Another*:

'... the procedures in respect of IVF and surrogacy differ substantially. In relation to the former, although the "host mother" may not necessarily be the genetic mother of the child she retains a gestational link to the child as a result of carrying the child. In regard to surrogacy a genetic link is created between the child-to-be and the commissioning parents or parent.'¹⁴⁶

The majority were of the view that '[t]he gestational link is considered emotionally significant as it allows the woman to feel that the child is 'hers' and that she is a 'normal' mother who conceived 'naturally'.¹⁴⁷ This is problematic because, as the minority of the Constitutional Court observed, it 'entrenches certain "normal" kinds of family life ... The implication is that the mother of an adopted child should not feel that she is a "normal" mother'.¹⁴⁸ It implies that when a woman uses IVF, her gestational role makes her a 'normal' mother because she has compensated for being unable to contribute her genetics. It is unacceptable to suggest that mothers who have used IVF only have a claim to parenthood because of their gestational contribution. This completely undervalues her psychological and social role as a parent and undervalues the second parent involved in double-donor IVF / surrogacy, who will not have gestated the child nor contributed eggs / sperm. This reasoning suggests that the second parent is not a 'real' parent because he / she did not have any gestational or genetic role.

It is argued that the procreative decisions of doubly-infertile intended parents aiming to use surrogacy should be respected. One potential solution is to allow intended parents using double-donor surrogacy to apply for a parental order, providing it would not harm the child.¹⁴⁹ Deleting section 54(1)(b) would remove the unjustified discrimination encountered by doubly-infertile people and send a valuable message

¹⁴⁶ *Op cit*, n15. Para [289] (Nkabinde J (Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Jafta J, Mhlantla J and Zondo J concurring)).

¹⁴⁷ *Ibid*, fn [273] of the Constitutional Court's majority decision.

¹⁴⁸ *Op cit*, n15, [121].

¹⁴⁹ The children's rights implications of removing the genetic requirement from the HFEA 2008 are discussed in the following chapter.

that social and psychological parenthood is just as important as gestational and genetic parenthood.

4.5 Challenging the ‘Adopt Instead’ Argument: Exploring why Double-Donor Surrogacy is a Procreative Choice

At the crux of the discrimination preventing doubly infertile intended parents from applying for a parental order, is the assumption that non-genetic intended parents may as well use adoption. The ‘adopt instead’ argument is problematic because it assumes that becoming the parent of a genetically unrelated child by means of adoption is ‘*functionally equivalent* to becoming the parent of a child genetically unrelated to oneself by means of surrogacy’.¹⁵⁰ Section 54(1)(b) HFEA 2008 effectively dictates that doubly-infertile couples should adopt rather than use double-donor surrogacy, thus severely limiting the procreative choices of the doubly-infertile. Although adoption and double-donor surrogacy can ‘both result in a person becoming the parent of a child unrelated to them, what this entails may be radically different’.¹⁵¹ The ‘adopt instead’ argument ignores the procreative input doubly-infertile intended parents can have in the surrogacy context. The following section draws upon empirical work carried out for this thesis, which shows how the processes relating to surrogacy are unique and differ greatly from adoption.

The ‘adopt instead’ argument also ignores the fact that a doubly-infertile couple / individual may not want to adopt a child or be in a position to do so. There are many barriers facing adoptive parents in the UK, including emotional and practical. Considering how different double-donor surrogacy and adoption are, the ‘adopt instead’ argument should not be taken seriously and doubly-infertile intended parents should be allowed to use surrogacy and apply for a parental order.

(I) Comparing Surrogacy and Adoption Processes: Conception, Surrogate Selection and Pregnancy

¹⁵⁰ *Op cit*, n15. [174] Khampene J (minority).

¹⁵¹ *Ibid*, [175].

Although the end result of adoption and double-donor surrogacy is that a person / couple becomes the legal parent of a child genetically unrelated to them, the nature of the relationship between the parents and child is substantially different. This is observed by Khampepe J in his minority judgment in the South African's Constitutional Court's decision, *AB and Another*:¹⁵²

‘In the case of double-donor surrogacy, an emotional link develops between commissioning parent and child through the choices that the commissioning parent makes before conception, at conception, and during pregnancy’.¹⁵³

By contrast, the emotional link that develops between parent and adoptive child, ‘is of an entirely different nature’.¹⁵⁴ With surrogacy, the intended parents are ‘involved at various stages in the creation of a child’,¹⁵⁵ including gamete selection, which ‘causes prospective parents – particularly non-biological parents – to feel that they are contributing to the process of procreation’.¹⁵⁶ Although the intended parent is not a gestational or genetic parent, ‘gamete donor selection by the prospective parents establishes a positive psychological link between the prospective parents and their prospective child...’.¹⁵⁷

The empirical work carried out for this thesis confirms Khampepe J's argument that the processes involved in double-donor surrogacy are radically different from adoption. One mother, Liz, who had twins through surrogacy was interviewed about her experiences as the non-genetic parent. She explained that she was very involved in the selection of donor eggs, which were fertilised with her husband's sperm. The husband's genetic connection to the children meant they could apply for a parental order. However, after the award of the parental order the intended parents separated, and Liz now has sole care of the children. She explained that she was involved in selecting the donor eggs and used a company in California. She chose someone ‘who’d

¹⁵² *Op cit*, n15.

¹⁵³ [180].

¹⁵⁴ [178].

¹⁵⁵ *Ibid*.

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*.

done it twice before and who did it for ethical reasons'.¹⁵⁸ Although Liz never met the egg donor, she had a portfolio of her. Liz explained that she knew everything about the egg donor, including 'what her Grandparents died of and pages and pages of pictures of her growing up'.¹⁵⁹ Although Liz does not have a genetic link to her children, she contributed to the process of procreation by involving herself in the egg donor selection process. The 'adopt instead' argument does not stand up to scrutiny considering how intended parents can be involved in the conception of the child, whereas adoptive parents cannot.

Furthermore, with double-donor surrogacy the intended parents have a role in selecting the surrogate. As Khampepe J observes in *'AB and Another'*, 'this process occurs before conception, and can radically alter how the commissioning parent and prospective child relate once the child is born.'¹⁶⁰ This process does not happen with adoption. A further difference between the processes involving adoption and surrogacy, is that parents using surrogacy are often intimately involved in the pregnancy. In one study, Jadvá *et al.* asked the surrogate mothers how involved the intended mother and father had been during the pregnancy.¹⁶¹ This was rated according to one of three categories for mothers and fathers separately: 'no or little involvement'; 'moderately involved'; and 'very involved'.¹⁶² 'No or little involvement' was coded when the intended parent 'had very little contact with the surrogate mother during her pregnancy'.¹⁶³ 'Moderately involved' was coded when the intended parent 'showed some interest in the pregnancy by attending some scans or antenatal appointments',¹⁶⁴ and a rating of 'very involved' was coded when the intended parent 'attended all of the scans or were aware of all the appointments and would discuss the appointments with the surrogate mother if unable to attend'.¹⁶⁵ The results showed that the surrogates felt the vast majority (83%) of intended mothers were 'very involved' with the

¹⁵⁸ Interview 05IM, recorded on 26/08/16 (on file with the author).

¹⁵⁹ *Ibid.*

¹⁶⁰ *Op cit*, n15, [179].

¹⁶¹ Jadvá *et al.*, *op cit*, n16.

¹⁶² *Ibid.*, p2198.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

pregnancy, with 17% of surrogates reporting that the intended mother had been ‘moderately involved’.¹⁶⁶

This corresponds with the empirical findings of this thesis, where most of the intended parents reported being ‘very involved’ in the surrogate’s pregnancy. One of the intended mothers, Liz, who selected the egg donor from California was very involved in the pregnancy despite the two surrogates living in another country (India). The surrogates had ‘3D scans every two weeks’ and they were all emailed over to Liz which meant she was a part of the pregnancy despite living on the other side of the world. A second intended mother, Sophie, had a child through surrogacy and was interviewed for this project. She reported being very involved in the pregnancy and described herself as ‘lucky’ because she ‘went to every single appointment, even the ones towards the end where you just go to see the midwife and you’re with them for 20 minutes’.¹⁶⁷ Sophie was ‘there for everything’¹⁶⁸ and when she saw her surrogate, Sophie explained it was like ‘seeing the baby and it helped me to...bond with the baby and feel like we were having a child’.¹⁶⁹ Being so involved in the pregnancy was important for the intended mother because:

‘Obviously not having a bump, not being visibly pregnant sometimes it doesn’t feel very real and actually seeing [the surrogate] and being involved as much as possible in the process helped me feel bonded...’.¹⁷⁰

During the pregnancy Sophie and her surrogate ‘were in touch almost every single day and she [the surrogate] was sending me little updates like the baby’s kicking or he’s particularly active today...’.¹⁷¹ Gemma, an intended mother who was single *and* had no genetic link to her child, also reported feeling very involved in the surrogate’s

¹⁶⁶ *Ibid*, p2200. 44% of surrogates felt that the intended fathers were very involved with the pregnancy, a further 47% felt that they were moderately involved, and 9% felt that the intended father had no or little involvement. 94% of surrogates were happy with the degree of involvement of the intended father.

¹⁶⁷ Interview 02IM, recorded on 09/07/16 (on file with the author).

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

¹⁷⁰ *Ibid*.

¹⁷¹ *Ibid*.

pregnancy: ‘I’ve not missed anything I almost feel like I’ve been pregnant myself really! It’s been a different experience.’¹⁷² This type of involvement in the pregnancy is not something adoptive parents have the opportunity to do with their adopted children. These empirical insights suggest that double-donor surrogacy should be brought within the scope of Robertson’s procreative liberty framework. Although it does not concern genetic procreation, the activities the intended parents are involved with before the child is born are connected to the process of procreation.

Another difference between (double-donor) surrogacy and adoption, is that with the former the intended parents and surrogate have the opportunity to remain in each other’s lives after the child is born. Sophie and her surrogate decided to have contact afterwards because she:

‘Always felt very strongly that my son should have contact with [the surrogate] and her family because that’s a part of his history and I’d never want to deny him of that...’.¹⁷³

After Sophie’s child was born, she sent the surrogate ‘pictures regularly and little updates on how he was doing’.¹⁷⁴ As will be seen in chapter 6, this long-term contact is likely to be facilitated by organisations like COTS and SUK. Lauren, who used SUK, explained that the ethos of the organisation is ‘surrogacy through friendship and the emphasis is on the relationship between the surrogate and the intended parents and investing in a genuine bond’.¹⁷⁵ She and her husband met their surrogate at a social and described the experience in the following way:

‘It felt like meeting my husband in a way, like meeting ‘the one’, we just instantly connected and knew there was something very special in the relationship.’¹⁷⁶

Lauren and her husband Zak then got to know the surrogate other over a six-month period, ‘hanging out, getting to know each other’s family and met each other’s

¹⁷² Interview 06IM, recorded on 11/07/17 (on file with the author).

¹⁷³ Interview 02IM, recorded on 09/07/16 (on file with the author).

¹⁷⁴ *Ibid.*

¹⁷⁵ Interview 07IM, recorded 15/07/16 (on file with the author).

¹⁷⁶ *Ibid.*

extended family: brothers, sisters, mums, dads, cousins.... Just getting to know each other really and building up trust.¹⁷⁷ This is less likely to happen with adoption where the mother giving her child up for adoption is unknown to the adopters. As such, 'there are important psychological differences between becoming a parent through adoption, and having a child through surrogacy',¹⁷⁸ so it is not the case that the doubly-infertile may as well adopt.

Overall, the processes involving double-donor surrogacy and adoption are completely different. With surrogacy, the intended parents have the opportunity select donors and a surrogate, be highly involved in the pregnancy and maintain contact with the surrogate, and her family, afterwards. Therefore, 'having a child using double-donor surrogacy is thus not merely a difference in mechanics'.¹⁷⁹ As Khampepe J notes in *AB and Another 'CC'*, 'we must show equal respect to these different mechanisms of forming a family.'¹⁸⁰ Adoption is not a less-optimal way of having a family. Rather, double-donor surrogacy and adoption are different, and we should let individuals decide how they want to create a family. A parental order (as opposed to an adoption order) is the most appropriate order for double-donor surrogacy because it reflects how the child has deliberately been brought into existence as a result of the intended parent's intention and procreative input, and the surrogate's intention to become pregnant with the purpose of handing the child over to the intended parents. Double-donor surrogacy is therefore distinct from pre-natal adoption because the surrogate must have the intention to have a child for the purposes of surrogacy before any fertility treatment takes place.

(II) Judging the Procreative Choices of Doubly-Infertile people?

Section 54(1)(b) HFEA 2008 effectively leaves doubly-infertile couples no option other than to adopt. It is suggested that behind this provision lies a deep-rooted view that adoption is the only appropriate method of family-building for those who cannot

¹⁷⁷ *Ibid.*

¹⁷⁸ *AB and Another (CC)*, *op cit* n15. Para [180] Khampepe J.

¹⁷⁹ [185] Khampepe J.

¹⁸⁰ [180] Khampepe J.

contribute their gametes to the creation of the child. Worryingly, there is a view that when doubly-infertile people choose to pursue ARTs and surrogacy over adoption, they are somehow selfish. This view is fuelled by commentators including Batholet who suggests that:

‘[i]f we genuinely cared about children's interests, we would focus on finding adoptive homes for existing children in need rather than on creating new made-to-order adoptees for adults in need.’¹⁸¹

This suggests that doubly-infertile people who choose to have a child through surrogacy cannot really care about children, otherwise they would have chosen adoption. Appleton and Pollak similarly note that law and popular culture ‘view adoption through a humanitarian lens that depicts selfless adults welcoming parentless children into their homes and hearts’.¹⁸² By contrast, there is a ‘popular understanding of assisted reproduction, including IVF, whose users are often depicted as self-indulgent shoppers for “designer babies” or “insta-famil[ies]’.¹⁸³

This view has been compounded by the Grand Chamber in *Paradiso*, which made ‘accommodating reference’¹⁸⁴ to the Italian court’s suggestion that the applicants were using the child as an instrument to:

‘Fulfil a narcissistic desire ... or to exorcise an individual or joint problem. Furthermore, it ... doubted whether they [the applicants] displayed the “instinct of human solidarity which must be present in any person wishing to bring the children of others into their lives as their own children” ’.¹⁸⁵

The Grand Chamber did not criticise or speak out against this unjustified attack on the procreative choices of the applicants. In failing to do so, the Grand Chamber have

¹⁸¹ Elizabeth Bartholet, *Family Bonds: Adoption, Infertility, and the New World of Child Production* (Houghton Mifflin 1999). p 226. See also, D Friedrich, ‘A Duty to Adopt?’ *Journal of Applied Philosophy*, Vol. 30, No. 1, 2013, which makes the case for a general duty to adopt.

¹⁸² S Frelich Appleton and R A. Pollak, ‘Response Exploring the Connections Between Adoption and IVF: Twibling Analyses’, *Minnesota Law Review Headnotes*, 2011 (95:60), 60-80, p 65.

¹⁸³ *Ibid.*

¹⁸⁴ *Op cit*, n6. Joint Dissenting Opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev, [12], p72.

¹⁸⁵ [207].

compounded the view that non-genetic intended parents pursuing ARTs, over adoption, are ‘narcissistic’ monsters lacking ‘human solidarity’. The same criticism is not levelled at those who can conceive and have children naturally; fertile people also have the chance to adopt an existing child but there is no suggestion that their decision to have a child naturally is a selfish/ ‘narcissistic desire’. Change must come from the European Court to respect all forms of parenthood.

Furthermore, even where an infertile person wants to adopt a child, rather than choose surrogacy, this option may be frustrated due to barriers facing adoptive parents. The number of children available for adoption in the UK is limited.¹⁸⁶ Those seeking adoption also face hurdles of ‘suitability.’ One intended mother, Rosie, had a child through surrogacy. She had ten rounds of IVF to try to conceive but her doctors found that she had a condition in her uterus which meant she lost the pregnancies at a very early stage. Rosie and her husband then looked into adoption, however, she found that would be very difficult because of health conditions that she and her husband had. Therefore, even where adoption is the individual’s preferred choice before surrogacy, adoption law and regulation does not necessarily facilitate this choice.

A 2010 study into adopters’ experiences of being recruited found that over a quarter of respondents (27percent) were actively turned away from applying from the agencies they approached, with 29 percent saying there were turned away from three or more agencies. One couple were told they were, ‘... too young, didn’t look married, didn’t look as if we are in a committed relationship and didn’t live in the area.’¹⁸⁷ Another lesbian couple felt that ‘one authority was not interested in accepting us due to our sexuality’.¹⁸⁸ Another respondent ‘walked away from the local authority as it was

¹⁸⁶ Department for Education, ‘Children looked after in England (including adoption), year ending 31 March 2017’, available at, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664995/SFR50_2017-Children_look_after_in_England.pdf (last accessed 04/04/18).

¹⁸⁷ Adoption UK, ‘Waiting to be parents: adopters’ experiences of being recruited’, available at. < [https:// www.adoptionuk.org/sites/default/files/articles/Waiting%20to%20be%20Parents%20-%20Adopters %27%20Experiences%20of%20Being%20Recruited.pdf](https://www.adoptionuk.org/sites/default/files/articles/Waiting%20to%20be%20Parents%20-%20Adopters%27%20Experiences%20of%20Being%20Recruited.pdf)> (last accessed 04/04/18).

¹⁸⁸ *Ibid.*

made clear that couples who applied were priority over singles.’¹⁸⁹ Addressing the problems with adoption practices are beyond the scope of this thesis. Nevertheless, the study demonstrates how adoption is not always a choice, even for parents who want to pursue that route over surrogacy.

Furthermore, not everyone wants to adopt a child, or is able to do so. Some of the intended parents interviewed for this project explained that they thought about adoption before choosing surrogacy. Sophie wanted to use surrogacy, rather than adoption, so that she and her husband:

‘Could raise [the child] from birth...so kind of imprinting on them our love and values right from the beginning rather than...meeting a child when there is already kind of problems and then you’re trying to help them recover from that’.

As noted by Blake *et al.*, children available for adoption in the UK ‘have generally been removed from their parents by state intervention, usually on the grounds of abuse or neglect, and typically will also have spent time in foster care before adoption’.¹⁹⁰ Therefore, by the time the child is adopted, he / she ‘may well have had troubled and changing social relationships which may adversely affect their development and well-being’.¹⁹¹ Not everyone is in a position to deal with these issues and become an adoptive parent. Feeling unequipped to be an adoptive mother was what motivated another intended parent, Lauren, to use surrogacy: she ‘knew absolutely that I would want to care for a child from the moment that they were born and for that child’s identity to have always been a part of my family as me with the mother.’¹⁹² Lauren thought about adoption but decided against that road to parenthood; she did not feel ‘equipped to give a child through adoption the proper care having not been a parent before and all the issues that can come and I didn’t think that would be fair.’¹⁹³ Since

¹⁸⁹ *Ibid.*

¹⁹⁰ L Blake, M Richards and S Golombok, ‘The Families of Assisted Reproduction and Adoption’, in *Family-Making: Contemporary Ethical Challenges*, Françoise Baylis and Carolyn McLeod, (Oxford University Press, 2014). P65.

¹⁹¹ *Ibid.*, p65.

¹⁹² Interview IM07, recorded on 15/07/16 (on file with the author). By contrast, the Department of Education found that the average age of an adopted child was 3 years and 4 months, in the year ending 31 March 2017. *Op cit*, n186 above.

¹⁹³ Interview IM07, *Ibid.*

adoption may not be appropriate, or even an option, for some intended parents the ‘adopt instead’ argument should not be used to stop doubly-infertile intended parents using surrogacy and applying for a parental order.

4.6 Conclusion

This chapter has demonstrated that there is an ‘overly genetic view of parenthood’¹⁹⁴ in the context of surrogacy. It is recalled that Robertson limits procreative liberty to those who create genetically related offspring:

‘Procreative liberty should include a right to gestate when gestation is essential to or part of a person’s way to have *genetic offspring for rearing*, just as use of IVF, embryo freezing, sperm and egg freezing, and related activities are. They all enable a person to reproduce, ie, *produce genetically related offspring*.’¹⁹⁵

This version of procreative liberty is evident in section 54(1)(b) HFEA 2008, which restricts parental orders to couples where at least one applicant has contributed their gametes to the creation of the child. This genetic view marginalises other types of ‘natural parenthood’, including social and psychological.¹⁹⁶ In *Re F & M*,¹⁹⁷ for instance, the judgment created a hierarchy of parenthood by subtly attaching more importance to P’s biological role.

This chapter also demonstrated that the ECtHR has also adopted a genetic view of ‘family life’ in surrogacy cases. Despite the quality of personal ties that existed between the applicants and child, the Grand Chamber in *Paradiso* fixated on the duration of the cohabitation which was worth less because there was no genetic connection. The judgment ultimately makes a distinction between legitimate surrogacy families who are genetically related, and illegitimate surrogacy families who share no genetic connection, a distinction also made by section 54(1)(b) HFEA 2008. The South African judgments ‘*AB v Minister of Social Development (HC)*’¹⁹⁸

¹⁹⁴ A Diduck, *op cit*, n1.

¹⁹⁵ *Op cit*, n24, p2, (emphasis added).

¹⁹⁶ *Re G*, *op cit*, n9.

¹⁹⁷ *Op cit*, n60.

¹⁹⁸ *Op cit*, n14.

and ‘*AB and Another (CC)*’¹⁹⁹ demonstrates how the exclusion of doubly-infertile intended parents from section 54(1)(b) HFEA discriminates against this sub-class of parents. Ultimately, claims to parenthood should not be limited to gestation or biology; social and psychological parenthood must be acknowledged too.

The argument that non-genetic intended parents may as well adopt is flawed. Empirical work carried out for this thesis suggests that there could be ‘important psychological differences between becoming a parent through adoption, and having a child through surrogacy’.²⁰⁰ The case studies involving Liz, Sophie, Gemma and Lauren showed that intended parents select donors, choose their surrogate and create friendships with their surrogate. They are involved in the pregnancy and maintain contact with the surrogate afterwards. Although these activities do not assist with the creation of a *genetically related* child, they are inextricably linked to the procreation process and should be brought within Robertson’s framework of procreative rights. In light of the problems with the genetic requirement, the HFEA 2008 should remove section 54(1)(b) HFEA and adopt a broader view of procreative liberty currently afforded by Robertson, the HFEA 2008 and the ECtHR. This would remove the discrimination currently encountered by doubly-infertile intended parents and acknowledge that this group of social and psychological parents have as much of a claim to parenthood as genetic parents.

¹⁹⁹ *Op cit*, n15.

²⁰⁰ *Ibid*, [180] Khampepe J.

5. Exploring the HFEA 2008's Gestational and Genetic Definitions of Parenthood: What About the Child's Social Parent(s)?

5.1 Introduction

In *Re G*,¹ Baroness Hale stated that 'there are at least three ways in which a person may become the natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case'.² The first is genetic parenthood, which can help the child understand 'his own origins and lineage, which is an important component in finding an individual sense of self as one grows up'.³ The second type of natural parenthood, gestational, recognises that the process of gestation and birth can create 'a very special relationship between mother and child, a relationship which is different from any other'.⁴ The third type of natural parenthood is social and psychological:

'Which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting.'⁵

Whilst in many cases, the natural mother combines all three and the natural father combines genetic and psychological parenthood, 'there are also parents who are neither genetic nor gestational, but who have become the psychological parents of the

¹ [2006] UKHL 43.

² [33] (Baroness Hale).

³ *Ibid.*

⁴ [34] (Baroness Hale).

⁵ [35] (Baroness Hale).

child and thus have an important contribution to make to their welfare.’⁶ Intended parents who have a child through surrogacy, where one or neither have a genetic connection to the child, is one example.

Although doubly-infertile⁷ intended parents may be the natural ‘social’ parents of the child, they cannot apply for a parental order to become the child’s *legal* parents.⁸ Furthermore, intended parents who can apply for a parental order (and satisfy section 54(1)(b) HFEA 2008) are not the legal parents of the child until the parental order is awarded.⁹ This means they are the ‘social’ (and perhaps genetic) parents of the child but have no legal status to reflect this. Section 33 HFEA 2008 also assigns the surrogate legal motherhood even though she is not the child’s ‘social’ parent. It must be questioned whether legal parenthood should be linked to gestation (section 33 HFEA 2008) and genetics (section 54(1)(b) HFEA 2008), or whether it would be in the best interests of the child to award legal parenthood to the child’s intended parents (irrespective of whether a genetic tie exists) on the basis that they are the child’s social parents.

This chapter explores these issues across three substantive parts. The first, considers whether section 33 HFEA 2008 is consistent with the best interests and rights of the surrogacy-conceived child. Interviews with four intended mothers who had children through surrogacy (Sophie, Sally, Lauren and Rosie) are used to consider whether legal parenthood should be assigned to the intended parents sooner, and what difference this would make for the child. It is questioned whether the basis of legal parenthood should be intention, an argument advanced by Horsey,¹⁰ or whether legal parenthood should be assigned to multiple parents (e.g. the surrogate and intended

⁶ [37] (Baroness Hale).

⁷ Those who have no genetic and gestational connection to the child.

⁸ Section 54(1)(b) HFEA.

⁹ The intended parents cannot apply for a parental order until six weeks after the child’s birth. (Section 54(7) HFEA 2008).

¹⁰ K Horsey, ‘Challenging presumptions: legal parenthood and surrogacy arrangements’, 22 *Child and Family Law Quarterly*, 449 2010.

parents).¹¹ The advantages and disadvantages with each approach are explored. Part 5.3 uses *Re G*,¹² a case concerning a dispute between the child's social parent and gestational and genetic mother, to explore the importance of social parenthood. It is suggested that section 54(1)(b) HFEA marginalises the non-genetic intended parent in cases: (1) where the surrogate changes her mind about the agreement,¹³ and (2) where the non-genetic intended parent's relationship with the other intended parent breaks down.¹⁴ Studies from Golombok *et al.*,¹⁵ are used to consider whether removing the genetic requirement, thus allowing doubly-infertile parents to apply for a parental order, would have a negative impact on the child.

The final part asks whether the removal of sections 33 and 54 (1) (b) can be reconciled with the child's right to access information about their genetic and gestational origins,¹⁶ especially since parental disclosure to the child about their origins is a problem.¹⁷ It is considered whether the encouragement of early parental disclosure and reforms to the UK birth registration system, like those proposed by Crawshaw *et al.*,¹⁸ could help to overcome these concerns. Ultimately, this chapter argues that social parents should be assigned legal parenthood (through a parental order) irrespective of whether they have a genetic and / or gestational tie to the child, and this does not have to mean denying the child information about their origins.

¹¹ S Oultram, 'One mum too few: maternal status in host surrogate motherhood arrangements?' *Journal of Medical Ethics* 2015; 41: 470–473. doi:10.1136/medethics-2012-100949.

¹² *Op cit*, n1.

¹³ *CW v NT and another* [2011] EWHC 33; and *H & S (Surrogacy Agreement)* [2015] EWFC 36.

¹⁴ *JP v LP & Others* [2014] EWHC 595 (Fam).

¹⁵ S. Golombok, C. Murray, V. Jadvá, E. Lycett, F. MacCallum and J. Rust, 'Non-genetic and non-gestational parenthood: consequences for parent–child relationships and the psychological well-being of mothers, fathers and children at age 3', *Human Reproduction* Vol.21, No.7 pp. 1918–1924, 2006. P. 1922.

¹⁶ Articles 7 and 8 CRC; and Article 8 ECHR.

¹⁷ E Blyth and L Frith, 'Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity', *International Journal of Law, Policy and the Family* 23, (2009), 174-191. P185.

¹⁸ M Crawshaw, E D Blyth and J Feast, 'Can the UK's birth registration system better serve the interests of those born following collaborative assisted reproduction?', *Reproductive BioMedicine and Society Online* (2017) 4, 1–4.

5.2 Is the HFEA's Approach to Legal Motherhood Consistent with Children's Rights?

Lind and Hewitt explain that 'reproductive technologies clearly have the ability to complicate the status and function of parents by disrupting the genetic, gestational and social links between adults and children'.¹⁹ Surrogacy arrangements involve up to five 'parents': two biological parents (an egg and sperm donor), a gestational parent (the surrogate) and two social parents (the intended parents). Despite this, section 33 HFEA 2008 demonstrates that the 'legal status of motherhood is bound to gestation'.²⁰ The surrogate, 'and no other woman', is the legal mother, even if she is not genetically related to the child. It is only when a parental order is awarded to the intended parents, that the surrogate's legal motherhood and parental responsibility are extinguished, and the intended parents finally become the child's legal parents. This section explores whether this is in the best interests of the child.

(I) Section 33 HFEA 2008: Legal Motherhood and Gestation

It is apparent that 'the current legal framework operates on the fundamental assumption that children should only have one mother and utilises an either / or approach'.²¹ As Horsey laments:

'The law is clear that the gestational mother's claim should be prioritised if she changes her mind and elects to keep the child. Not only is she unquestionably given legal motherhood, further legislation provides that surrogacy arrangements are wholly unenforceable. This is more than a presumption— law has made "a choice between mothers"''.²²

¹⁹ C Lind and T Hewitt, 'Law and the complexities of parenting: parental status and parental function', *Journal of Social Welfare and Family Law*, 31:4, (2009) 391-406, DOI: 10.1080/09649060903430249. At p392.

²⁰ S Oultram, *op cit*, n11, p472.

²¹ J Wallbank, 'Too Many Mothers? Surrogacy, Kinship And The Welfare Of The Child', *Medical Law Review*, 10, Autumn 2002, pp. 271–294, p277.

²² K Horsey, *op cit*, n10, p460.

It is questionable whether this approach reflects the parties' intentions or is in the best interests of the child. Problematically, the second parent depends upon whether the surrogate is married or in a civil partnership. If the surrogate is married to a man at the time of treatment, and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then he is to be treated as the father (unless he did not consent to the treatment).²³ This is the case even where the surrogate's husband is not the genetic parent of the child. This is a 'wholly unnecessary legal fiction'²⁴ because it does 'not mirror the way that fatherhood following other forms of assisted reproduction is regulated'.²⁵ If the surrogate is in a civil partnership or married to a woman at the time of treatment, the other party to the civil partnership or marriage is treated as the child's second parent unless it is shown that she did not consent to treatment.²⁶ Again, this is the case even if the other party to the civil partnership or marriage is not the biological parent of the child.

The intended parents must apply for a parental order to become the legal parents of the child. Whilst an adoption order can also grant legal parenthood to the intended parents, it is inappropriate for a surrogacy-conceived child.²⁷ It is recalled from *J v G*²⁸ that a parental order confers joint and equal legal parenthood and parental responsibility upon both the intended parents.²⁹ It also fully extinguishes the parental status of the surrogate (and her spouse / civil partner) under English law.³⁰ However, without the surrogate's consent, the intended parents cannot apply for a parental order. As Oultram notes, 'one consequence of this is that if a host surrogacy arrangement fails the commissioning mother has no legally recognised maternal status in relation to the surrogate child'.³¹ As such, the surrogate has the ultimate say on whether the

²³ Section 35 HFEA 2008.

²⁴ K Horsey, *op cit*, n10, p451.

²⁵ *Ibid.*

²⁶ Section 42 HFEA 2008.

²⁷ See chapter 3, part 3.4 which discusses how an adoption order, child arrangement order and wardship are inappropriate alternatives for a child conceived via surrogacy.

²⁸ [2013] EWCH 1432 (Fam).

²⁹ [27] (Theis J).

³⁰ *Ibid.*

³¹ S Oultram, *op cit*, n11, p470.

intended parents are able to apply for a parental order. This suggests that the surrogate's claim to parenthood is stronger than the intended parents and it must be questioned whether this is in the best interests of the surrogacy-conceived child.

There is an argument that legal motherhood should be assigned to the surrogate because of the bonding that occurs between the gestational mother and child during gestation. However, bonding is 'as much a reflection of social construction as it is of biology'.³² If the surrogate does not expect to be recognised as the legal parent of the child and she knows that the intended parents will raise the child, 'bonding may not take place at all, not to the same extent, or in a different, more disconnected, way.'³³ There is a related child welfare argument for assigning legal motherhood to the surrogate: '...children having an uncertain biological legacy, or detachment from their "natural" mother, may be psychologically harmed'.³⁴ However, three points can be made against this argument. Firstly, to 'ascribe prima facie parenthood to a couple that never intended to keep the child may not promote the child's welfare'.³⁵ Secondly, as long as the child has knowledge about their surrogate (and gamete donors), the child is still able to have a certain 'biological legacy'.³⁶ Finally, 'there is no evidence to support the claim that children are better cared for by biological, rather than intentional, parents.'³⁷ The following subsections explore the views of the intended parents and surrogates interviewed for this project, to see how legal parenthood could, and should, be assigned in a way that promotes the child's best interests.

(II) Assigning Legal Parenthood Sooner?

Four mothers, who were interviewed for this project, expressed their dissatisfaction with the way legal parenthood is currently assigned under the HFEA 2008. The first intended mother, Sophie, believed that it 'would be good for the legal parentage of the child to be resolved very quickly ... and we would have full parental responsibility for

³² K Horsey, *op cit*, n10, p461.

³³ *Ibid.*

³⁴ *Ibid*, p462.

³⁵ *Ibid.*

³⁶ See part 3 below.

³⁷ K Horsey, *op cit*, n10, p463.

our child and therefore be able to make decisions on his behalf ...’³⁸ She explained during the interview that it can feel ‘very insecure’³⁹ not to have legal parenthood until the parental order is awarded and stated that ‘it doesn’t seem like that’s in the best interests of the child for his parents that he’s living with to not have parental responsibility for him’.⁴⁰ Sophie, explained that she thought a pre-birth order would be a positive reform and used divorce as an analogy:

‘What would have been good is if you could make a pre-birth order, erm, and perhaps for that to be like with divorce when you have the *decree nisi* and the *decree absolute* – a provisional version during the pregnancy and then confirmed on birth and for that process to be very quick.’⁴¹

Assigning legal parenthood to the intended parents upon the child’s birth would also provide more certainty for the parties involved. It would clarify that the intended parents can make important decisions on behalf of the child, including consent to emergency medical treatment. It would also give the child’s intended parents more power when disputes arise over neonatal care, for example between the intended parents and surrogate or intended parents and healthcare professionals. Another intended mother, Sally, was dissatisfied with the rules on legal parenthood.⁴² As her mother was the surrogate, Sally was reassured that if anything had gone wrong or the baby required medical treatment before the parental order was awarded, her mother ‘could easily assist and give her consent...’.⁴³ Sally explained that if the surrogate was someone outside her family she would have felt more dependent on them, which made her feel ‘quite uneasy’.⁴⁴ Mary agreed that her daughter should have been assigned legal parenthood sooner. She suggested that assigning legal parenthood to the intended parents at an earlier stage would create greater certainty:

³⁸ Interview ‘02IM’, recorded on 09/07/16 (on file with the author).

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Sally’s mother Mary – also interviewed for this project – acted as her surrogate.

⁴³ Interview ‘08IM’, recorded on 08/07/16 (on file with the author).

⁴⁴ *Ibid.*

‘You have the stress of worrying if the pregnancy is going to go alright ... and when they’ve safely arrived there’s still that doubt in the back of your mind that somebody somewhere could say something and say no’.⁴⁵

Mary believed that changing the law to recognise the intended parents as the child’s legal parents from the moment of birth would help discourage surrogates who are at risk of changing their mind; an uncertainty that is facilitated by section 33 HFEA 2008 and the consent provision in section 54(6) HFEA 2008.

Lauren also found problems with the provisions on legal parenthood. She explained how she was parenting her children but not recognised as the legal mother. Lauren’s husband was on the original birth certificate as the child’s father but her own lack of legal status made her feel vulnerable. If the children had been taken into emergency medical care, she was unsure if she would have been able to give consent to treatment. Lauren explained that:

‘From a social point of view, as a new mum going to mum group it’s hard enough when you haven’t had a bump and haven’t had a pregnancy, your birth story is very unusual compared to everybody else. Then to know that technically you aren’t the mother...it’s very difficult.’⁴⁶

She also felt that the current rules on legal parenthood, and her inability to be recognised as the child’s legal mother, is ‘not helpful for parents having confidence and talking to their children proudly about their origins, which is hugely important from the child’s perspective’.⁴⁷

Rosie’s legal situation was slightly different. When the child was born, she shared parental responsibility with the surrogate (who was unmarried and not in a civil partnership). The surrogate nominated Rosie to be the second legal parent from birth.⁴⁸

⁴⁵ Interview 02SM, recorded on 10/07/16 (on file with the author).

⁴⁶ Interview ‘07IM’, recorded on 15/07/16 (on file with the author).

⁴⁷ *Ibid.*

⁴⁸ According to section 43 HFEA 2008, ‘if no man is treated by virtue of section 35 as the father of the child and no woman is treated by virtue of section 42 as a parent of the child but— (a) the embryo or the sperm and eggs were placed in W, or W was artificially inseminated, in the course of treatment services provided in the United Kingdom by a person to whom a licence applies, (b) at the time when the embryo or the sperm and eggs were placed in W, or W was artificially

However, she was not the child's legal mother which caused problems 'in terms of coming into contact with the hospital when you're having pregnancy care and ante-natal care'.⁴⁹ She found it incredibly difficult 'not being able to stay with your baby in the immediate post-natal period...'⁵⁰ and said this caused 'a lot of stress'.⁵¹ During the interview, Rosie explained how she would get referred to as the 'egg donor' by the hospital which caused great emotional stress. She believed that 'the law encourages this attitude'⁵² by denying her status as the child's legal mother. It is suggested that according legal parenthood to the intended parent(s) from the moment of the child's birth would help nurture the bond between the intended parent(s) and child and allow the intended parent(s) to feel more involved during the immediate post-natal period.

It is clear from these accounts that the intended mothers would have preferred legal parenthood to be assigned to them sooner and believed this would have provided more certainty for them and their children. As D'Alton-Harrison notes, 'recognition as a parent is important not only for the social status of the parent but also for the identity of the child'.⁵³ Article 8 CRC provides that States will 'undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference'. Since the intended parents plan to raise the child, 'family relations' should include relationships between the child and their social parents. Section 33 HFEA 2008 also raises issues for the surrogacy-conceived child's right to Article 7 CRC, which provides that the child should have 'as far as possible, the right to know and be cared for by his or her parents.' The child's intended parents should be assigned legal parenthood sooner, to ensure

inseminated, the agreed female parenthood conditions (as set out in section 44) were met in relation to another woman, in relation to treatment provided to W under that licence, and (c) the other woman remained alive at that time, then, subject to section 45(2) to (4), the other woman is to be treated as a parent of the child.

⁴⁹ Interview '03IM', recorded on 11/07/16 (on file with the author).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ R D'Alton-Harrison, 'Mater Semper Incertus Est: Who's Your Mummy?', 2014, *Medical Law Review*, Vol. 22, No. 3, pp. 357–383. P369.

that the adults looking after the child, have the rights and responsibilities that come with parental status:

‘There are practical legal issues to navigate in raising a child which depend on recognition of parentage such as admission into the UK for the child based on the parent’s nationality, the right to approve medical procedures for the child, enrolment of the child into school, the right to bring and defend legal proceedings on behalf of the child, and succession rights of the child to the parent’s estate on intestacy.’⁵⁴

The child’s intended parents are unable to acquire these rights until after a parental order is awarded, which can take several months.

(III) Intention-Based Parenthood?

It is recalled from earlier chapters that the ‘functional family’ model could be used to assign legal parenthood in the surrogacy context. As Millbank suggests:

‘Functional family claims rest on a performative aspect, that is, the parties are granted rights because of what they *do* in relation to one another, not because of the *status* of who they *are* or what manner of legal formality they have undertaken’.⁵⁵

Under this model, legal parenthood would be assigned to the intended parents – who care for the child daily – through the award of a parental order. The period from birth until a parental order is awarded is evidence that the intended parents have become the child’s social and psychological parents ‘in the real world’. Arbitrary factors such as relationship status and biology therefore become irrelevant. However, if – as this chapter proposes – legal parenthood is to be assigned to the intended parent(s) at birth, then they will not yet have *performed* any parenting functions, which reveals a weakness with the functional approach. A further problem with a functional approach is that it:

‘falters in intra-family disputes because at the most basic level, there is simply no longer a united – functioning – functional family. Rather the court is confronted with

⁵⁴ *Ibid.*

⁵⁵ J Millbank, ‘The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family’, *International Journal of Law, Policy and the Family*, (2008) 22 (2): 149. P150.

conflicted – dysfunctional – individuals with contradictory accounts of who their family is, and was.’⁵⁶

A functional claim to parenthood could be used by a surrogate who refuses to hand the child over to the intended parents, or an intended parent who separates from their spouse / partner and wants to parent the child alone. In the context of intra-lesbian disputes, Millbank makes an argument for a ‘form of automatic, universal and stable legal recognition for co-mothers based on pre-conception intention. The rationale for recognition is that the attempt to conceive was a shared enterprise between the women’.⁵⁷ This shared desire to conceive and become parents ‘is not assessed by reference to post-birth factors, such as caregiving in the functional family model.’⁵⁸ An intention-based approach to legal parenthood in the surrogacy context would help reduce the marginalisation of intended parents who may find it difficult to prove they have functioned as a parent when they have separated from the other intended parent, or where the surrogate decides to keep the child.

In the US judgment *Johnson v Calvert*,⁵⁹ intention was pivotal in determining who the child’s legal mother should be. During the pregnancy, relations between the intended parents (Mr and Mrs Calvert) and surrogate (Ms Johnson) deteriorated which resulted in the surrogate changing her mind about handing over the child.⁶⁰ Seven months into the pregnancy, Mr and Mrs Calvert sought a declaration that they were the legal parents of the unborn child, and Ms Johnson responded with an action to be declared the legal mother.⁶¹ Under the Uniform Parentage Act, both the surrogate and the intended mother had shown evidence to support a finding that either was the child’s ‘natural mother,’ the former by means of gestation and the latter by means of genetics.⁶² However, like UK law, California law only recognised one legal mother.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, p163.

⁵⁸ *Ibid.*

⁵⁹ 851 P 2d 776, (1993) (Supreme Court of California).

⁶⁰ Mr and Mrs Calvert were the genetic parents of the child, having donated their gametes to create the embryo.

⁶¹ [88] (Panelli J).

⁶² [92] (Panelli J).

Panelli J, writing for the majority, argued that the woman who intended to procreate the child – in this case Mrs Calvert – was the natural mother under Californian law:

‘... [the Calverts] *affirmatively intended the birth of the child, and took the necessary steps to effect in vitro fertilisation. But for their acted-on intention, the child would not exist* ... No reason appears why Anna's later change of heart should vitiate the determination that Crispina [Calvert] is the child's natural mother.’⁶³

In this respect, intention ‘is significant in its bringing “the infertile” couple in from the cold; it acts, as it were, as a way of regularizing (or normalizing) their procreative intent.’⁶⁴ Horsey submits that intention ‘encompasses the motivation to have a child, initiation and involvement in the procreative process and a commitment to nurture and care’.⁶⁵ She acknowledges that ‘the genetic and gestational contributors to the child (if they are different people) undoubtedly possess compelling claims to parenthood’⁶⁶ but doubts whether ‘these claims are as strong or as accurately reflect the social situation that will be in place as those of the intending parents’.⁶⁷ For example, if the surrogate and her spouse or civil partner do not intend to raise the child then assigning legal parenthood to them, rather than the intended parents, does not reflect the child’s social situation.

The point at which legal parenthood should be assigned to the intended parents is problematic. If it is assigned before the child is born, the intended parents could make decisions about the unborn child which could impede upon the surrogate’s own autonomy. Moreover, it is uncertain whether the intended parents would feel comfortable with acquiring legal parenthood whilst the child is in utero. Gemma, whose surrogate was pregnant at the time of the interview, said: ‘when it comes to the birth because she’s been there, done that, I would leave her [the surrogate] to make the right decision. Whatever she felt comfortable with.’⁶⁸ If legal parenthood was

⁶³ [93] (Panelli J) (emphasis added).

⁶⁴ D Morgan, ‘The Surrogacy Issue: Who Is the Other Mother?’ (1994) 8 *International Journal of Law and Family*. PP386-412, p392.

⁶⁵ K Horsey, *op cit*, n10, p455.

⁶⁶ *Ibid*, p456.

⁶⁷ *Ibid*.

⁶⁸ Interview 06IM, recorded on 11/07/16 (on file with the author).

assigned to the intended parents pre-conception, or before birth, the surrogate may not feel in control of her own pregnancy. It is suggested that a presumption of legal parenthood could be created in favour of the intended parents, which comes into effect as soon as the child is born. This could take effect by pre-authorising parental orders so that legal parenthood is conferred on the intended parents at birth, a view shared by the 2017 *Myth Busting Report*.⁶⁹ This presumption could be rebuttable, (and the parental order revoked) where the court decides it is not in the best interests of the child to be raised by the intended parents.⁷⁰

(IV) More than Two Legal Parents?

During an interview with one of surrogates, Kate, it became clear that the views about legal parenthood in this context are far from uniform. When discussing the rules on legal motherhood being automatically assigned to the surrogate through section 33 HFEA 2008, Kate explained that she was ‘one of those people who is for that’. She said:

‘I think it’s good because to me, even though it is surrogacy and it’s not your baby and you’re doing it for someone else, the fact that you grow that baby and give birth makes you that child’s birth parent...They could bring it forward so the intended parents are the parents from day one, but I’m not for the reform at all.’⁷¹

This might be explained by Kate’s desire to have continued contact with the child. She ‘wished’ there was ‘something you could sign to agree to stay in contact, but I know that’ll never happen.’⁷² It is suggested that a compromise can be reached between the intended parent’s and surrogate’s claims to parenthood; legal parenthood could be

⁶⁹ ‘Surrogacy in the UK: Myth busting and reform’, *Report of the Surrogacy UK Working Group on Surrogacy Law Reform*, (November 2015) <<https://kar.kent.ac.uk/59740/1/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf>> (last accessed 10/09/18). At p6. However, the next chapter will argue that parental orders should only be pre-authorised where the parties have used a non-profit surrogacy organisation (and not where a do-it-yourself arrangement has been used).

⁷⁰ For example, where the surrogate is better able to promote the child’s welfare and best interests, or where the intended parents (or one intended parent) change their mind about the surrogacy.

⁷¹ Interview 01SM, recorded on 07/07/16 (on file with the author).

⁷² *Ibid.*

assigned to the surrogate *and* intended parents. Oultram suggests that where a surrogacy arrangement fails the intended mother ought to be granted the status of mother but ‘this should not be interpreted as advocating the denial of maternal status to the surrogate mother’.⁷³ In other words, he suggests that surrogacy-conceived children should have two ‘legal’ mothers, the intended mother and the surrogate. This would require changes to the current law which only recognises that the child has two legal parents.

Recognising multiple legal parents could also be an option where the parties *all* intend to be child’s social parents. In *A.A. v. B.B.*⁷⁴ the Ontario Court of Appeal held that the child had three legal parents: BB, his biological father; CC, his biological mother; and AA, his biological mother’s same sex partner. AA and CC were long-term same-sex partners who decided to start a family together. They approached their friend, BB, who agreed to be a sperm donor:

‘The parties all agreed that the couple would be the child’s primary caregivers, and that it was in D.D.’s best interests to have a relationship with his father. All three individuals were very involved in D.D.’s life and believed that each had equal status as a parent.’⁷⁵

Rosenberg J.A., for the unanimous Court, concluded that ‘a declaration of parenthood has both practical and symbolic importance in a parent-child relationship...More importantly, it demonstrates to a child that his family is valued and accepted’.⁷⁶ It is suggested that allowing multiple legal parents could be in the best interests of the child where the parties have all agreed to be the child’s social parents.

However, where there is no dispute between the surrogate and intended parents, and the surrogate does not want to raise the child, it might be inappropriate to describe the surrogate as the child’s ‘mother’. As Wallbank suggests there is a difference between

⁷³S Oultram, *op cit*, n11, p471.

⁷⁴*A.A. v. B.B.*, (2007) 83 O.R. (3d) 561 (C.A.) [*A.A. v. B.B.*].

⁷⁵A Bird, ‘Legal Parenthood and the Recognition of Alternative Family Forms in Canada’, 2010 University of New Brunswick Law Journal, pp264-293. At p287.

⁷⁶*Ibid*, p288.

maternity (the birthing role) and motherhood (raising the child).⁷⁷ She points out that gestating a child does ‘not necessarily equate to being a mother’.⁷⁸ It is also doubtful whether most surrogates want to be assigned legal motherhood. One of the intended mothers interviewed explained that:

‘Surrogates do not want to be given legal parenthood at birth. They do not want to be recognised as the legal parent. Not only does it completely misrepresent their motives and what surrogacy is, they’re plagued by this perception that they are giving their child away. The law supports that myth and it’s not helpful, it stigmatises them. Also, they don’t want the practical responsibility of having legal parenthood for a child that isn’t theirs.’

In an interview with Rosie, who had a child through surrogacy, she was asked how she felt about legal motherhood being assigned to the surrogate. She replied:

‘I think a more important question is how X [the surrogate] feels about it.... X’s feelings are very much that it is not her child and she doesn’t feel like it’s appropriate for the law to make it an obligation for her to be the legal parent for any period after the baby is born. She feels quite strongly actually.’⁷⁹

Although these views come from the intended parent (rather than the surrogates), these accounts resonate with findings from Imrie and Jadvā who report that ‘in terms of the surrogate’s relationship with the child conceived through surrogacy, surrogates report that they do not view the child as their own child’.⁸⁰ 41% of surrogates reported ‘feeling a “special bond” towards the child’,⁸¹ but none described this as a parental or mother-child bond. The 2017 *Myth Busting Report*⁸² also found that 72 (64.9%) surrogates thought that the legal parents of a child born through surrogacy should be

⁷⁷ J Wallbank, *op cit*, n21, p282.

⁷⁸ *Ibid.*

⁷⁹ Interview 03IM, recorded on 11/07/16 (on file with the author).

⁸⁰ S Imrie and V Jadvā, ‘The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements’, *Reproductive BioMedicine Online* (2014) 29, 424–435. P425.

⁸¹ *Ibid.*

⁸² *Op cit*, n69.

the intended parents, whether genetically related or not.⁸³ Another 10 surrogates (9%) said it should be the intended parents when both are genetically related.⁸⁴ Only four surrogates (3.6 %) said the surrogate and the intended father (if he provided sperm) should be the legal parents, and only four surrogates (3.6 %) thought the surrogate and her partner should be the legal parents.⁸⁵ It is clear that the majority of surrogates who took part in the study did not view themselves the child's mother and believed the intended parents should have legal parenthood.

It is clear that section 33 HFEA, and the rules on parenthood, fail to support the child's social parents (i.e. intended parents) who have no legal parenthood when their child is born. It is suggested that it is not in the child's best interests for the surrogate to be awarded legal motherhood at the expense of the intended parents. Evidence also indicates that the majority of surrogates do not want to be assigned legal motherhood. It is suggested that the intended parents should be presumed to be the legal parents of the child (irrespective of genetic connection, or relationship status). This would allow the intended parents and surrogate to be 'recognised for the actual roles they play: the commissioning parents intend to be parents and the surrogate intends to have the child for others'.⁸⁶ Assigning legal parenthood to all parties could be an option where the surrogate and intended parents all agree to have a child-rearing role.

5.3 The Genetic Requirement in Section 54 HFEA 2008: What about the Child's 'Social' and 'Psychological' Parents?

In addition to the problems arising from section 33 HFEA 2008, the legislation also adopts an overly genetic view of the child's intended parents. Section 54(1)(b) requires that 'the gametes of at least one of the applicants were used to bring about the creation of the embryo'.⁸⁷ This section explores the children's rights implications of the genetic requirement and how it affects the child's social and psychological parent. It is recalled

⁸³ *Ibid*, p21.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*.

⁸⁶ K Horsey, *op cit*, n10, p470.

⁸⁷ See chapter 4 for a discussion on how this affects the rights of doubly-infertile intended parents.

from *Re G*,⁸⁸ that Baroness Hale explained ‘there are at least three ways in which a person may become the natural parent of a child, each of which may be a very significant factor in the child’s welfare, depending upon the circumstances of the particular case’.⁸⁹ In addition to genetic and gestational parenthood, the child may also have social and psychological parents.⁹⁰ Social parenthood has been defined as ‘those who act as ‘parents’ in the real world in which a child lives’⁹¹ and as ‘a combination of motivation, intention, involvement and nurturance’.⁹² Shapiro contends that:

‘It might be ideal (and certainly simpler) if being a social parent meant being a legal parent and vice versa. Unfortunately, this is not the case. Sometimes the law fails to acknowledge the parenthood of a child’s social parent, while sometimes the legal parent of a child may not function as a social parent in the child’s world.’⁹³

However, there is a difference between natural and legal parents. A couple who use surrogacy, but are not genetically related to the child, may be the child’s natural parents (e.g. social parents) but they are not recognised as the child’s ‘legal’ parents. Legal parenthood is important because it gives ‘a person legal standing to bring and defend proceedings about the child and makes the child a member of that person’s family.’⁹⁴

The potential unfairness of section 54(1)(b) HFEA 2008 for the child’s social parent is evident from one of the empirical case studies. One of the intended mother’s, Liz, has no genetic link to her children but carries out the day-to-day parenting of her twins and is their mother ‘in the real world’.⁹⁵ She was involved in the conception of the

⁸⁸ *Op cit*, n1.

⁸⁹ [33].

⁹⁰ [33]-[35].

⁹¹ J Shapiro, ‘Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children’ in M. Maclean (ed), *Family Law and Family Values* (Hart Publishing, 2005), p82.

⁹² R Cook ‘Donating Parenthood: Perspectives on Parenthood from Surrogacy, Gamete Donation’ p135 in *What is a Parent: A Socio-Legal Analysis* Edited by A Bainham, S Day Sclater, and M Richards for the Cambridge Socio-Legal Group (Hart, 1999).

⁹³ J Shapiro, ‘A Lesbian Centered Critique of “Genetic Parenthood,” 9 *Journal of Race, Gender and Justice* 591 (2005), pp 592-593.

⁹⁴ [32] (Baroness Hale).

⁹⁵ J Shapiro, *op cit*, n91.

children and chose the egg donors and surrogates. She also lived in India with the twins for several months after their birth before returning to England. Despite this, if Liz had been a single applicant, or she entered the surrogacy as part of a couple using a donated embryo (i.e. without her husband's sperm) she would not have been able to apply for a parental order. An intended parent, or doubly-infertile couple, with no genetic link to the child cannot apply for a parental order even though they may act as the child's parents 'in the real world'⁹⁶ and, unlike adoption, have had a role in procreating the child.

The genetic requirement in section 54(1)(b) HFEA 2009 makes a dangerous presumption that children require biological parents. This is contrary to the 'no presumption' approach set out in *J and Another v C and Others*,⁹⁷ where it was held that there would be no presumption in favour of biological parents in disputes between them and long-term foster carers. Instead, the welfare of the child was the paramount consideration and although the claim of natural parents was 'often of great weight and cogency and often conclusive [it] had to be regarded in conjunction with all other relevant factors, and had to yield if, in the end, the welfare of the child so required'.⁹⁸ The effect of this was to clarify that there is no presumption favouring the genetic birth parents. When the law was reviewed in 1986, the Law Commission supported the 'no presumption approach' in *J v C*.⁹⁹ The Law Commission noted that the child may have a closer relationship with someone other than his 'natural' genetic parent:¹⁰⁰

'The emotional and psychological bonds which develop between a child (especially a very young child) and those who are bringing him up are just as "natural" as are his genetic ties to one whose interest may be based solely on a blood tie ...'¹⁰¹

⁹⁶ *Ibid.*

⁹⁷ [1969] 1 All ER 788.

⁹⁸ *Ibid.*, [813] (Lord Macdermott).

⁹⁹ Working Paper No 96, Review of Child Law: Custody (1986). Available at <http://www.lawcom.gov.uk/wp-content/uploads/2016/08/No.096-Family-Law-Review-of-Child-Law-Custody.pdf> (accessed 20/02/17).

¹⁰⁰ *Ibid.*, 6.21.

¹⁰¹ *Ibid.*

Therefore, the Law Commission concluded that ‘the welfare of each child in the family should continue to be the paramount consideration whenever their custody or upbringing is in question between private individuals’.¹⁰² As such, section 1 of the Children Act 1989 does not include a presumption in favour of the ‘natural parent’ and it is not a factor in the welfare checklist. This invites the question as to why section 54(1)(b) HFEA 2008 requires the child to have at least one genetic parent when the CA 1989 does not include a ‘natural parent’ presumption at all.

(I) Social and Psychological Parenthood: Lessons from *Re G*?

It is argued that the genetic requirement, in addition to section 33 HFEA 2008, undermines social and psychological parenthood, which was deemed to be a natural form of parenthood by Baroness Hale in *Re G*.¹⁰³ The case involved a lesbian couple, CG and CW, who arranged for anonymous donor insemination at a clinic abroad¹⁰⁴ which resulted in CG giving birth to two girls. CG and CW brought up the children together until their relationship broke down, at which point the couple disputed the future of the children. The first issue was ‘the weight to be attached to the fact that one party is both the natural and legal parent of the child and the other is not’.¹⁰⁵ The second issue of principle was ‘the approach to be adopted by the court where the party with whom the child has her principal home is reluctant to acknowledge the importance of the other party in the child's life’.¹⁰⁶

In September 2003, an order was made which allowed CW (the children’s social parent) interim contact two evenings a week and every other weekend.¹⁰⁷ Around December 2003 CG moved to her new partner’s home in Leicester where she enrolled the children at nursery and school without consulting CW.¹⁰⁸ During a further hearing in November, the children’s genetic mother, CG, gave evidence that she wanted to

¹⁰² *Ibid*, 6.22.

¹⁰³ *Op cit*, n1, [33].

¹⁰⁴ [6] (Baroness Hale).

¹⁰⁵ [7] (Baroness Hale).

¹⁰⁶ [7] (Baroness Hale).

¹⁰⁷ *Ibid*.

¹⁰⁸ [12] (Baroness Hale).

move with her new partner and the children to Cornwall.¹⁰⁹ The judge concluded that ‘the proposed move was in part deliberately designed to frustrate the current contact arrangements’¹¹⁰ and ordered that CG continue to live with the children in Leicester.¹¹¹ The judge continued the alternate weekend and also provided for CW to be informed about the children's education and medical treatment, thus acknowledging the importance of the children’s psychological and social parent.¹¹²

Soon after, CG's solicitors wrote requesting CW's agreement to a move to Cornwall.¹¹³ This was refused but while the children were on holiday with CW, CG and MG completed the sale of their home in Leicester and purchased a house in Cornwall.¹¹⁴ CG and MG ‘collected the children at the regular handover point in Leicester and drove them through the night to their new home’.¹¹⁵ Both CW and the girls had not been informed of the plan and this constituted a breach of the court’s order for CG to remain in the Leicester area. As the Children's Guardian said in evidence:

‘...from a child care perspective whether that order existed or not, to move the children in that way, in secret, without them having the opportunity to say goodbye to their friends and their school friends, I think, ... was an appalling thing to do to them...’.¹¹⁶

Ultimately, CG had unfairly sought to marginalise the children’s psychological and social mother without thinking about how this would impact upon the children.

CW applied for the residential arrangements to be changed, so that the children's primary home would be with her in Shropshire.¹¹⁷ Bracewell J ‘had no confidence that if the children remained in Cornwall CG would promote the children's essential close

¹⁰⁹ [15] (Baroness Hale).

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² [16] (Baroness Hale).

¹¹³ [18] (Baroness Hale).

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ [19] (Baroness Hale).

relationship with CW and her family'.¹¹⁸ Accordingly, she preserved the shared residence order but reversed the times allocated to each home so that the children would spend the majority of time with CW. CG unsuccessfully appealed to the Court of Appeal.¹¹⁹ Thorpe LJ accepted the propositions that 'the identity of a child's natural (biological) parents is always a matter of significance'¹²⁰ but qualified this by submitting that 'in each case the weight to be given to the blood relationship will depend upon the matter in issue, the identity of the parties and the court's assessment of all other factors in the welfare checklist'.¹²¹

Although CG successfully challenged the reversal in the parties' positions after appealing to the House of Lords, the importance of CW in the children's lives was not overlooked by the courts or professionals involved. The children's guardian described CW as an 'impressive woman' who was 'genuinely driven by a desire to protect her children and that she has tried always to act in their best interests'.¹²² He also reported favourably, of CW's son, C, and was impressed with the 'articulate and intelligent young man' who joined in all the games with his sisters.¹²³ As aforementioned, Baroness Hale explained that there are at least three ways in which a person can become the natural parent of a child, '... each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case'.¹²⁴ The first is genetic parenthood, which is important for the child because he 'reaps the benefit not only of that love and commitment, but also of knowing his own origins and lineage, which is an important component in finding an individual sense of self as one grows up'.¹²⁵ Nevertheless, Baroness Hale stated that genetic parenthood is important but by no means 'an essential component'.¹²⁶ The second type of parenthood is

¹¹⁸ [23] (Baroness Hale).

¹¹⁹ *Re G* [2006] EWCA Civ 372.

¹²⁰ [49] (Thorpe LJ)

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Op cit*, n1, [33] (Baroness Hale).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

gestational, which involves the conceiving and bearing of the child.¹²⁷ Baroness Hale suggests that this facilitates certainty and convenience, but also recognises a deeper truth: ‘that the process of carrying a child and giving him birth...brings with it, in the vast majority of cases, a very special relationship between mother and child, a relationship which is different from any other’.¹²⁸

Genetic or gestational parenthood do not always apply to parents who use ARTs and/or surrogacy. Consequently, Baroness Hale also acknowledged the importance of ‘social and psychological’ parenthood. Adopting Goldstein at al., Baroness Hale stated that social and psychological parenthood involves:

‘The relationship which develops through the child demanding and the parent providing for the child’s needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting’.¹²⁹

Whereas ‘in the great majority of cases, the natural mother combines all three’¹³⁰ Baroness Hale acknowledged that there are also parents, including doubly-infertile intended parents using surrogacy and those in the position of CW, ‘who are neither genetic nor gestational, but who have become the psychological parents of the child and thus have an important contribution to make to their welfare’.¹³¹ The case highlights how social and psychological parenthood is a form of natural parenthood and how marginalising this type of parent can be harmful to the children involved. It is suggested that section 54(1)(b) HFEA marginalises social parenthood in the same way. The vulnerability of the non-genetic intended parent is evident: (1) where the surrogate changes her mind about the agreement, and (2) where the non-genetic intended parent’s relationship with the other intended parent breaks down.

¹²⁷ [34] (Baroness Hale).

¹²⁸ *Ibid.*

¹²⁹ [35] (Baroness Hale).

¹³⁰ [36] (Baroness Hale).

¹³¹ [37] (Baroness Hale).

(II) Breakdown of the Surrogacy Agreement: What about the Child's Non-Genetic Intended Parent?

In CW v NT and another,¹³² which was discussed in the previous chapter, the parties had entered into a surrogacy agreement, but following the birth of the child, the surrogate refused to hand her over. The child's welfare required that she remain with the surrogate because Baker J was satisfied that the surrogate 'would foster contact and a close relationship between the child and her father'.¹³³ Presumably, the child would also be spending time with the intended mother whilst in the care of her biological father, yet the judgment did not mention the surrogate's need to foster a relationship between the child and Mrs W (the intended mother), thereby failing to acknowledge Mrs W's future role as a social parent in the child's life. In this situation, Oultram's suggestion that the child should have two legal mothers would ensure the child's non-genetic intended mother, in this case Mrs W, is not marginalised.¹³⁴

In *H & S*,¹³⁵ the non-genetic intended parent was also marginalised. The case concerned the future arrangements for an infant girl (M) who was born as the result of assisted conception and 'of an agreement, the basis of which is highly contested, between S (the 1st Respondent and the mother) and H (the 1st Applicant and the father) and B (the 2nd Applicant) his partner'.¹³⁶ S was the child's legal mother and H was the child's legal father. H was in a long-term and committed relationship with B and was at the time of conception. H and B contended that they had an agreement with S that she would act as a surrogate and that 'H and B would co-parent the child but that S would continue to play a role in the child's life'.¹³⁷ However, S contested this version of events and argued that she and H entered an agreement that excluded B and that 'H would be, in effect, a sperm-donor',¹³⁸ and that she would take on the role of M's main

¹³² *Op cit*, n13.

¹³³ [73] (Baker J).

¹³⁴ S Oultram, *op cit*, n11.

¹³⁵ *Op cit*, n13.

¹³⁶ [1] (Theis J).

¹³⁷ *Ibid*.

¹³⁸ *Ibid*.

parent and carer.¹³⁹ Theis J clarified that the HFEA 2008 had no part in the decisions of the court because S did not consent to a parental order and denied that she was a surrogate. Theis J stated:

‘Very sadly this case is another example of how “agreements” between potential parents reached privately to conceive children to build a family go wrong and cause great distress to the biological parents and their spouses or partners.’¹⁴⁰

This understates B’s role in the failed surrogacy arrangement. He is not simply the spouse or partner of the child’s ‘biological parent’, but planned to have an active role in raising the child alongside B.¹⁴¹ This was acknowledged by Theis J later in the judgment, when she stated:

‘I can make a parental responsibility order in B’s favour pursuant to s 12 (2A) CA as a person who is not M’s parent but who is named as a person with whom she is to spend time or otherwise have contact; and I do so as the evidence is that he is a significant person in her life; her biological father’s partner who cares for her has taken on a parental role when she has spent time with the Applicants.’¹⁴²

Nevertheless, the availability of parental responsibility, but not legal parenthood,¹⁴³ sends out a message that the child’s social and psychological intended parent is not as important as a biological or gestational parent. Assigning legal parenthood to the intended parents through a pre-birth parental order, which takes effect when the child is born, would ensure the child’s non-genetic parent is not marginalised when an assisted conception / surrogacy agreement goes awry.

(III) Relationship Breakdown: What Happens to the Child’s Non-Genetic Intended Parent?

¹³⁹ *Ibid.*

¹⁴⁰ [2] (Theis J).

¹⁴¹ A Child Arrangement order was made which determined that the child should live with H and B and both parties would have parental responsibility. Para [127] (Theis J).

¹⁴² [10] (Theis J).

¹⁴³ This option was unavailable because the child can only have two legal parents.

The non-genetic intended parent is also at risk of marginalisation from the child's life when his / her relationship breaks down with the second intended parent (who has a genetic link to the child). This is evident in *JP v LP & Others*,¹⁴⁴ which concerned a little boy, CP, who was born as the result of a surrogacy arrangement. The Applicant, JP, (the intended mother) was neither the birth nor genetic mother. JP had previously had a hysterectomy and along with LP, the father, decided to conceive through 'partial' surrogacy using the surrogate's egg and the intended father's sperm.¹⁴⁵ The mother and father sought the help of a friend of the mother, SP, who was 'artificially inseminated at home with the father's sperm, and became pregnant'.¹⁴⁶ CP was born on the 1st March 2010 and the surrogate was registered on the birth certificate as the 'mother' of CP; the intended father was shown as the legal father on the birth certificate.¹⁴⁷

In June 2010, the relationship between the mother and father broke down and JP left the marital home with CP.¹⁴⁸ On 15th July 2010 a shared residence order was made in favour of the mother and father. At that hearing JP and LP also undertook to regularise CP's legal status by issuing an application for a parental order, but due to delay the application was out of time.¹⁴⁹ During early 2011 'the relationship between the mother and father reached low ebb',¹⁵⁰ and on 7 March 2011 the mother issued an application for a specific issue order seeking the return of CP after contact. The shared residence order was confirmed, and the mother and father undertook to reissue their parental order application without realising the statutory time limit had now expired. On 12 September 2012 the mother made an application for sole residence of CP. The matter was transferred to the High Court and both CP and the surrogate were joined as parties.¹⁵¹

¹⁴⁴ *Op cit*, n14.

¹⁴⁵ [3] (Theis J).

¹⁴⁶ [4] (Theis J).

¹⁴⁷ [8] (Theis J).

¹⁴⁸ [8] (Theis J).

¹⁴⁹ [10], [11] (Theis J).

¹⁵⁰ [13] (Theis J).

¹⁵¹ [15] (Theis J).

King J clarified that the surrogate – having carried a child following assisted reproduction – ‘and no other woman’, is the child’s legal mother by virtue of section 33(1) HFEA 2008. Absent adoption or a parental order, she also retains parental responsibility for CP.¹⁵² The father, LP, ‘is the genetic and social father of CP.’¹⁵³ By contrast, the intended mother:

‘Has no status other than the emotional and social status of being CP’s psychological mother. Crucially she does not have parental responsibility, she cannot therefore give consent to medical treatment, register CP for a school or take a myriad of decisions in relation to CP which parents routinely do without a thought as to whether or not they have the authority to do so’.¹⁵⁴

A parental order was not an option because the statutory time limit had not been met. In any event, the shared residence order would have made it difficult to satisfy section 54(4)(a) HFEA 2008, that ‘at the time of the application and the making of the order ... the child’s home must be with the applicant’s’.¹⁵⁵

An adoption order could not ‘provide a solution to the problem of the mother’s status of irrevocable parental responsibility’¹⁵⁶ because if JP were to adopt CP alone, the father’s parental responsibility would be permanently extinguished as a result of sections 46 and 67 of the ACA 2002. Similarly, the mother and father could not adopt together because they were no longer married or living as partners in an enduring family relationship (as required by s 50 (1) and s 60 of the ACA 2002).¹⁵⁷ A Special Guardianship Order was equally unavailable because it would have allowed JP to exercise her newly granted parental responsibility to the exclusion of the surrogate and the father.¹⁵⁸ The mother was granted a shared residence order under s8 of the Children

¹⁵² [23] (Theis J).

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ [28] (Theis J). For criticism of the relationship provisions see chapters 2 and 3.

¹⁵⁶ [32] (Theis J).

¹⁵⁷ *Ibid.*

¹⁵⁸ [33] (Theis J).

Act 1989, the effect of which is to confer parental responsibility upon her. However, King J stated:

‘It remains, on any view, an unsatisfactory solution and understandably leaves the mother feeling vulnerable; a residence order does not confer legal motherhood upon her and, in the unlikely event that she ceased to have a residence order, she would lose her parental responsibility. Whilst a residence order regulates where CP lives and gives the mother parental responsibility, the surrogate mother retains legal motherhood and parental responsibility pursuant to s33, *HFEA* 2008.’¹⁵⁹

The court endorsed a family structure designed and presented by the parties. The parties agreed that CP shall remain a ward of court until further order.¹⁶⁰ The parties agreed a shared residence order between the mother and father and agreed that all issues of parental responsibility are delegated to the mother and father jointly.¹⁶¹ Finally, the parties agreed that the surrogate should be prohibited from exercising any parental responsibility for CP without the leave of the court.¹⁶² The case shows how the intended parent with no genetic connection to the child is left without the security of legal parenthood when this situation arises. A presumption of legal parenthood in respect of the intended parents would help to resolve this problem. It would ensure that legal parenthood is assigned to those who act, or intend to act, as the child’s psychological and social parent (in this case LP and JP). This would place those in JP’s position in a securer position and allow them to make decisions on behalf of the child. Alternatively, there could be scope for the law to accommodate for the child having more than one legal mother,¹⁶³ although as discussed earlier the majority of surrogates who took part in the *Myth Busting Report* did not want to be assigned legal motherhood at all.¹⁶⁴

¹⁵⁹ [34] (Theis J).

¹⁶⁰ [35] (Theis J).

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ See part 1 above.

¹⁶⁴ *Op cit*, n69.

(IV) Social Parenthood: Children's Identity and Psychological Well-Being?

It is suggested that assigning legal parenthood to purely social parents (i.e. doubly infertile couples or those without a genetic link to the child) is unlikely to have negative effects on the child's identity and psychological well-being.¹⁶⁵ Golombok *et al.*'s., study which looks at children at three years old, suggests that the 'absence of a genetic or gestational link between the mother and the child does not appear to impact negatively on parent-child relationships'.¹⁶⁶ The study found that families without a gestational and / or genetic link 'reflected higher levels of warmth and interaction between mothers and their 3-year-old children in the assisted reproduction families than in the comparison group of families with a naturally conceived child'.¹⁶⁷

With respect to psychological well-being, the researchers did not identify any differences between family types.¹⁶⁸ Families in which the mother lacks a genetic and / or gestational link to the child, and families in which the father lacks a genetic link to the child, are different in one important respect: the difference is 'the level of mother-child interaction, with the surrogacy and oocyte donation mothers showing higher levels of interaction than the mothers of children conceived by donor insemination'.¹⁶⁹ Golombok *et al.*, note that this finding is surprising because it might be 'expected that mothers who lack a biological link with their child would interact less with their child than biologically related mothers'.¹⁷⁰ However, the researchers suggest that:

'[I]t may be that women who are unable to conceive or carry a child themselves may become especially committed to parenting when they eventually become mothers or may try to compensate for the absence of a genetic or gestational link.'¹⁷¹

¹⁶⁵ S Golombok, *et al.*, *op cit*, n15, p1922.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*, p1922.

¹⁷⁰ *Ibid.*, p1922.

¹⁷¹ *Ibid.*, p1922.

As such, this study indicates that removing the genetic requirement is unlikely to affect psychological well-being, and parent-child wellbeing, in a negative way. To the contrary, *Re G* itself demonstrates the valuable role a social mother can play in the child's life. In *Re G*, the child's social mother (CW) had brought up the children from birth. The children had developed a good relationship with CW and her son and the judge accepted that 'this relationship should be maintained throughout their minority through good quality frequent contact.'¹⁷² Moreover, the relationship between CW and her children was described as 'an essential close relationship' which must be promoted.¹⁷³ In a previous hearing, Her Honour Judge Hughes, had also provided for CW to be informed about the children's education and medical treatment,¹⁷⁴ thus acknowledging the importance of not marginalising the child's psychological and social parent.

It is suggested that section 54(1)(b) should be removed and a presumption of legal parenthood in respect of the intended parents should be created, on the basis that it is in the child's best interests for his / her social parents to be given legal parenthood. As Alghrani and Griffiths argue:

'Founding families is not a matter of genetics, but of love and commitment. Removing this requirement will allow the law to be more consistent with other areas of law and do more to protect the welfare of children in ensuring the individuals acting as parents are able to apply for the corresponding legal parental status.'¹⁷⁵

5.4 Double-Donor Surrogacy and a New Presumption of Legal Parenthood: Can these Reforms be Reconciled with the Child's Right to Identity?

Removing section 54(1)(b) HFEA 2008 would allow children to be conceived as a result of surrogacy and embryo donation (i.e. double-donor surrogacy). This means

¹⁷² [16].

¹⁷³ [23].

¹⁷⁴ [16].

¹⁷⁵ A Alghrani and D Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform', [2017] *Child and Family Law Quarterly*, 165. P176.

the child would have no genetic or gestational tie to either intended parent. This final section considers whether the removal of section 54(1)(b) HFEA 2008, and the removal of section 33 HFEA 2008 (and creation of a presumption of legal parenthood in respect of the intended parents), can be reconciled with ‘the growing legal emphasis of a child’s ‘right’ to knowledge about their origins and genetic parents’.¹⁷⁶ McCandless argues that this trend is ‘evidenced by the growth of ‘open adoptions’ and the fact that since April 1st 2005, gamete donors must provide identifying information, to which the children, born from their gametes, will be entitled to obtain, upon reaching 18’.¹⁷⁷ This section begins by setting out the right to establish details of one’s identity, which has been developed by the ECtHR and facilitated by changes to UK donor anonymity rules in 2005.

(I) The Right to Establish Details of one’s Identity

It is argued that access to genetic and gestational origins is important for the best interests of the child and his / her right to respect for identity (Articles 7 and 8 CRC) and private and family life (Article 8 ECHR, Article 16 CRC). Article 7 of the CRC provides the child with the right ‘...as far as possible ...to know ...his parents’ and it is argued that this should encompass all three forms of natural parenthood set out by Baroness Hale in *Re G*: gestational, genetic and social. Article 8 CRC also provides that States will ‘undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference’. Again, recording details of the surrogate and any gamete donors will help protect this right.

The right to establish details of one’s identity was developed in *Gaskin*,¹⁷⁸ where the European Court ruled that the UK government had breached Article 8 by denying Mr Gaskin access to the records about him held by the English local authority in whose care he had been placed as a child. The Court concluded that ‘respect for private life

¹⁷⁶ J McCandless, ‘Recognising Family Diversity: the ‘Boundaries’ of *Re G*’. *Feminist Legal Studies* 13(3) 323-336, 2005. At p 325.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Gaskin v. United Kingdom* (Access to Personal Files), 7 July 1989, 12 EHRR.

requires that everyone should be able to establish details of their identity as individual human beings...'.¹⁷⁹ If the genetic requirement is to be removed from the legislation, the child's right to establish details of their identity, including genetic progenitors, must be safeguarded in order for double-donor surrogacy to be compatible with Article 8 ECHR. In addition, if legal motherhood is no longer assigned to the surrogate, details of the surrogate must be recorded so that the child has access to information about their gestational 'parent'.

In the UK, anonymous gamete donation was abolished in April 2005. This change was catalysed by *R (on the application of Rose and another)*.¹⁸⁰ Rose, an adult woman, had been conceived in the UK using donor insemination prior to the HFEA 1990. Despite great efforts, she was unable to discover any information about the sperm donor. The other applicant, EM, a six-year old, had been conceived using donor insemination after the HFEA 1990 came into force. Both claimants had sought access to information about their anonymous sperm donors and the establishment of a contact register. The claimants relied on Articles 8 and 14 of the Convention. In '*Rose*' Baker J held it is clear from the Strasbourg jurisprudence, including *Gaskin*,¹⁸¹ *Johnson v. Ireland*,¹⁸² *Marckx v. Belgium*¹⁸³ and *Mikulic v. Croatia*¹⁸⁴ that:

'Respect for private and family life requires that everyone should be able to establish details of their identity as individual human beings. This includes their origins and the opportunity to understand them. It also embraces their physical and social identity and psychological integrity'.¹⁸⁵

Ms Rose's evidence demonstrates the importance of having the opportunity to access information about one's genetic identity and origins. She felt that these genetic connections were very important to her 'socially, emotionally, medically, and even

¹⁷⁹ [39].

¹⁸⁰ *R (on the application of Rose and another) v Secretary of State for Health and another* [2002] EWHC 1593 (Administrative Court). Hereafter '*Rose*'.

¹⁸¹ *Op cit*, n 178.

¹⁸² (1987) 9 E.H.R.R. 203

¹⁸³ (1979) 2 E.H.R.R. 330

¹⁸⁴ (App. No. 53176/99), ECHR, February 2002.

¹⁸⁵ [45].

spiritually’.¹⁸⁶ Moreover, she believed it was no exaggeration that ‘non-identifying information will assist me in forming a fuller sense of self or identity and answer questions that I have been asking for a long time...’.¹⁸⁷ Therefore, if section 54(1)(b) is removed, thus allowing double-donor surrogacy, the child must have access to information about their genetic progenitors. As noted by Baker J, it is entirely understandable that donor conceived children should wish to know about their origins, in the same way that adopted children do: ‘A human being is a human being whatever the circumstances of his conception and an AID child is entitled to establish a picture of his identity as much as anyone else.’¹⁸⁸ He also noted that we live in a much more open society and ‘secrecy nowadays has to be justified where previously it did not’.¹⁸⁹ Although Baker J agreed that Article 8 was engaged, he adjourned further deliberation on whether there had actually been an infringement pending completion of the government consultation.

Nevertheless, the case catalysed changes to donor anonymity rules in the UK. The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004,¹⁹⁰ were introduced to allow donor-conceived children (born from donations made after 1 April 2005) access to identifying information about their donor on reaching the age of 18. Blyth explains that when requesting identifying information held on the Register, a donor-conceived individual can request the following donor information from the Human Fertilisation and Embryology Authority (HFE Authority): ‘Full names (and any former names), date of birth and town or district where born, ‘appearance’, and last known postal address (or address recorded at time of registration’.¹⁹¹ Under the 2004 Regulations, the HFE Authority was ‘required to collect *additional* non-identifying donor information from July 2004’,¹⁹²

¹⁸⁶ [7].

¹⁸⁷ [7].

¹⁸⁸ [47].

¹⁸⁹ [47].

¹⁹⁰ Hereafter ‘Regulations 2004’.

¹⁹¹ E Blyth, ‘Access to genetic and birth origins information for people conceived following third party assisted conception in the United Kingdom’, *International Journal of Children’s Rights* 20 (2012) 300–318. P307.

¹⁹² *Ibid*, p306.

including marital status, parents' ethnic group, and personal and family medical history, which could be made available to any offspring seeking this information on reaching the age of 16.¹⁹³

Rules on donor information have since been amended by the HFEA 2008. Since 1st October 2009, 16 year olds have been able to 'ascertain whether information held on the Register indicates that (s)he may be donor-conceived and, if so, to receive any recorded non-identifying information about her or his donor.'¹⁹⁴ A 16 year-old can also find out whether information held on the Register 'indicates that (s)he may be donor-conceived and, if so, to receive any recorded non-identifying information about any donor-conceived genetically-related siblings.'¹⁹⁵ Moreover, Blyth explains that:

'any person born after 1st August 1991 aged at least 18 may both register with Donor Sibling Link – a new register established by the HFEA - and request identifying information about any donor-conceived sibling who has already agreed to the disclosure of her or his identity. Where any subsequent donor conceived siblings join DSL, all existing registered siblings will be notified.'¹⁹⁶

Therefore, children born as a result of donated gametes or embryos have a right to access this information providing a UK licensed clinic was used. Individuals subject to a parental order (i.e. those born as a result of surrogacy) can also access their 'long birth certificate', which records the surrogate as the child's legal mother. However, as Blyth and Frith lament:

'Donor-conceived people's ability to access information to which they are entitled is entirely dependent on their awareness of the nature of their conception and this is clearly compromised if parents do not tell their children about their conception in the first place. Concerns have been expressed about low levels of parental disclosure...'.¹⁹⁷

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ E Blyth and L Frith, *op cit*, n17, p185.

If sections 33 HFEA 2008 and 54(1)(b) HFEA 2008 are removed, there is a risk that surrogacy-conceived children will not learn of their genetic and / or gestational origins due to varying levels of parental disclosure.

(II) Comparative ‘Disclosure’ Rates in Surrogacy, Gamete Donation and Embryo Donation Families: Encouraging Early Parental Disclosure?

In the context of surrogacy, genetic and non-genetic intended parents have different information to disclose to their child. For gestational surrogacy, where the child is genetically related to both intended parents, disclosure involves telling the child that they were carried by a surrogate. By contrast, where donated gametes have been used, either from the surrogate or donors, the intended parents may also need to disclose the child’s genetic identity. Given the varying levels of disclosure between surrogacy, donor insemination (DI), and egg donation (ED) families, there is a risk that children born as a result of surrogacy *and* embryo donation, will only be partially informed of their conception. For instance, the child may be told about their surrogate but not the fact they were conceived as a result of embryo donation too. Readings *et al.*, conducted the first study to look comparatively at parents’ decisions in donor insemination (DI), egg donation (ED) and surrogacy families regarding telling their child and others about the method of conception.¹⁹⁸ Egg (oocytes) donation ‘is indicated where a woman is unable to produce healthy eggs of her own, whether due to age, to previous chemotherapy, to ovarian dysgenesis, dysfunction or absence, or for genetic/chromosomal/infection reasons.’¹⁹⁹ Sperm donation involves the insemination of a woman (in this context the surrogate) with sperm from a man who is not the intended parent. ‘The sperm is usually ejaculated in a clinical setting, tested for safety

¹⁹⁸ J Readings, L Blake, P Casey, V Jadv, S Golombok, ‘Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy’, *Reproductive BioMedicine Online* (2011) 22, 485-495.

¹⁹⁹ M H. Richards, ‘The Biology of Donation’, chapter 2 in *Reproductive Donation: Practice, Policy and Bioethics*, edited by M Richards, G Pennings and J B. Appleby, 2012 (Cambridge University Press). P18.

and preserved and placed into the woman's cervix or uterus or used to fertilize an egg through the use of IVF'.²⁰⁰

Readings *et al.*, observed that the rates of disclosure varied depending upon the method of conception. In the context of DI, studies show consistent rates of disclosure or intention to disclose, with studies reporting between 30% and 40%.²⁰¹ Less is known about ED families, but studies have found:

'quite variable rates of telling, from 29% of parents intending to tell their child about their conception (Murray and Golombok, 2003) to a US study by Klock and Greenfeld (2004) finding that 59% of ED parents planned to tell. A donor study of ED families conducted in Belgium found that 44% of couples intended to tell their child about the nature of their origins (Baetens *et al.*, 2000)'.²⁰²

Moreover, in 2004, Golombok *et al.*, also found that 46% of DI parents intended to tell their child about the nature of their conception compared to 56% of ED parents.²⁰³ In light of these studies on ED families, Readings *et al.*, state that the evidence 'generally suggests that ED parents may be slightly more open about the child's conception than DI parents.'²⁰⁴ Explanations for greater openness in ED families 'have ranged from ED being a more socially acceptable procedure, to the idea that pregnancy and childbirth compensate in some way for the absence of a genetic relationship'.²⁰⁵

In contrast to ED and DI families, less is known about the disclosure patterns in surrogacy families. One study by MacCallum in 2003 found that out of 42 couples with a child born by surrogacy, all were *planning* to tell the child about the nature of their birth; the most common reason for disclosure was that the child had the right to

²⁰⁰ T Glennon, 'UK and US perspectives on the regulation of gamete donation', chapter 6 in *Reproductive Donation: Practice, Policy and Bioethics*, edited by M Richards, G Pennings and J B. Appleby, 2012 (Cambridge University Press). At p91.

²⁰¹ J Readings *et al.*, *op cit*, n198, p486.

²⁰² *Ibid*, p487.

²⁰³ Golombok, S., Lycett, E., MacCallum, F., Jadv, V., Murray, C, Rust, J., 2004a. 'Parenting infants conceived by gamete donation', *Journal of Family and Psychology*, 18, 443-452.

²⁰⁴ Readings *et al.*, *op cit*, n198, p186.

²⁰⁵ *Ibid*, p486.

know the truth.²⁰⁶ In 2000 Van den Akker studied 29 women at various stages of surrogacy arrangements and found that 97% said they would disclose the surrogacy to their child.²⁰⁷ Another small UK study of 20 intended parents found that all intended to tell their child about the surrogacy.²⁰⁸

On the face of it, this data suggests that intended parents are open to their children about their origins. However, an intention to inform the child about their conception is different from acting upon that intention to inform. Furthermore, parents are selective about what aspects of the child's conception they disclose. In the study by Readings *et al.*, despite intended parents having reported that they had told their children about their conception, 'closer inspection revealed that 16 out of the 21 (76.2%) families in genetic surrogacy arrangements had only told their child that they were carried by another woman and had not yet disclosed the use of the surrogate mother's egg',²⁰⁹ but all said they would *probably* tell in the future.²¹⁰ This indicates that where surrogacy is used in conjunction with gamete or embryo donation, partial disclosure is a problem that could be exacerbated by removing the genetic requirement in section 54 HFEA 2008. Moreover, if legal motherhood is no longer assigned to the surrogate (who would no longer feature on the child's original birth certificate) couples might not inform the child about the surrogate and the fact they are not the child's genetic parents.

In order to reconcile the removal of sections 33 and 54(1)(b) HFEA 2008 with the child's right to know their genetic and gestational origins, early parental disclosure needs to be encouraged. Blyth suggests 'funding the Donor Conception Network to produce materials on "how to tell", and to run workshops on "telling"'.²¹¹ As part of

²⁰⁶ MacCallum, F., Lycett, E., Murray, C, Jadva, V., Golombok, S., 2003. 'Surrogacy: the experience of commissioning couples'. *Human Reproduction*. 18, 1334-1342.

²⁰⁷ O Van den Akker., 2000. 'The importance of a genetic link in mothers commissioning a surrogate baby in the UK', *Human. Reproduction*. 15, 1849-1855.

²⁰⁸ Blyth, E., 1995. 'Not a primrose path': commissioning parents' experiences of surrogacy arrangements in Britain'. *Journal of Reproduction Infant Psychology*. 13, 185-196.

²⁰⁹ Readings *et al.*, *op cit*, n198, p491.

²¹⁰ *Ibid.*

²¹¹ BioNews May 2008, E Blyth, '[Donor conception and birth certificates - more steps in the right direction](http://www.bionews.org.uk/page_37993.asp)', http://www.bionews.org.uk/page_37993.asp (last accessed 28/06/17).

this education drive, the government needs to address the stigma and misconceptions about donor conceived children and non-biological families. The Strasbourg institutions must play a stronger role in promoting early parental disclosure across member states. In this respect, *Paradiso and Campanelli*,²¹² which was discussed in the previous chapter, is extremely unhelpful because it creates stigma for donor conceived children who have been born through surrogacy. In particular, the majority referred to the possibility that ‘the child resulted from a narcissistic desire on the part of the couple or that he was intended to resolve problems in their relationship.’²¹³ The joint concurring opinions in *Paradiso* were particularly scathing of surrogacy and the non-biological family:

‘We consider that gestational surrogacy, whether remunerated or not, is incompatible with human dignity... Pregnancy, with its worries, constraints and joys, as well as the trials and stress of childbirth, create a unique link between the biological mother and the child. From the outset, surrogacy is focused on drastically severing this link...’.²¹⁴

This suggests that there is a legitimate type of family consisting of biological parents and their children. The attitude of the ECtHR will only result in a return of the culture of secrecy that the applicant’s in *Gaskin* and *Rose* sought to challenge, and the Strasbourg institutions must now work with member states to encourage early levels of parental disclosure.

(III) Reforming the Birth Registration System in the UK

The second reform that needs to accompany the removal of sections 33 and 54(1)(b) HFEA 2008, concerns the UK birth registration system. According to Crawshaw, Blyth and Feast:

‘The advent and increasing prevalence of gamete and embryo donation and surrogacy – or collaborative assisted reproduction – call into question the ability of the UK’s birth registration system to serve adequately the interests of those born as a result of such procedures’.²¹⁵

²¹²*Paradiso and Campanelli v Italy* Appl no. 25358/12 (ECtHR, Grand Chamber 24 January 2017).

²¹³ [191].

²¹⁴ P59, [7].

²¹⁵ M Crawshaw *et al.*, *op cit*, n18, p1.

At the moment, children subject to a parental order have two birth certificates. The ‘long’ birth certificate is a ‘certified copy of an entry’²¹⁶ and provides details of the individual’s name, date and place of birth, the father's name (if given at time of registration), his place of birth and occupation and the mother's name, place of birth, maiden surname and, after 1984, occupation.²¹⁷ The second birth certificate, ‘Certificate of Birth’, is colloquially known as the ‘short birth certificate’. This provides details of the individual’s name, sex, date and place of birth. However, it provides no information regarding parentage. When a child is born following a surrogacy arrangement, and a parental order is made, a Parental Order certificate (‘a true copy of an entry in the Parental Order Register’) is issued. A new Certificate of Birth is also issued following the parental order, which provides details of the name by which the child will be known following the order. At age 16 in Scotland, and 18 in the rest of the UK, a person subject to a parental order can apply for a copy of their original ‘long’ birth certificate from the relevant General Registry Office (GRO), but it is unlikely individuals will request this unless they have been informed about their conception.

The main problem with the current birth registration system is that it fails to record details of all the child’s parents (genetic, gestational and social). Crawshaw *et al.*, argue that this sits uneasily with the CRC and ECHR which promote the view that individuals should have a right to know their parents.²¹⁸ Although the birth registration system in the UK has adapted to take into account ‘adoption, surrogacy arrangements, civil partnerships and re-registration for transgender individuals’,²¹⁹ Crawshaw *et al.*, contend that:

²¹⁶ This certified copy of an entry is pursuant to the Births and Deaths Registration Act 1953 (England and Wales); the Births and Deaths Registration (Northern Ireland) Order 1976 (S.I. 1976/1041 (N.I. 14)) (Northern Ireland) or the Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Scotland).

²¹⁷ General Registry Office, ‘What information will I see on a birth, marriage or death certificate?’ https://www.gro.gov.uk/gro/content/certificates/most_customers_want_to_know.asp#CertificateInformation (last accessed 28/06/17).

²¹⁸ M Crawshaw *et al.*, *op cit*, n18, p2.

²¹⁹ *Ibid*, p1.

‘Birth registration has become a record of citizenship and legal parentage alone, and is not a source of information about one’s progenitors through recording biological facts or a public health record’.²²⁰

As a result, they suggest that birth certificates should include three groups of ‘parents’. The first group includes those with a linear genetic relationship to the child (i.e. the genetic ‘parents’ who may variously be the surrogate, the intended parents in a surrogacy arrangement, or an embryo or gamete donor).²²¹ The second group consists of those who carried the pregnancy and gave birth, even if they are not raising the child (i.e. the birth / gestational ‘parent’).²²² The final group consists of those raising the child (i.e. the intended parents). This approach would ensure that the gestational, genetic and social parents are recorded so that the child has information about their genetic and gestational origins. The certificate could clarify that only the intended parents are the legal parents of the child. Where the parties agree that the donor and / or surrogate is to play a child-rearing role, reforms should take place to allow for the child to have multiple legal parents.

Crawshaw *et al.*, propose that ‘the current ‘short’ and ‘long’ birth certificates, and perhaps even the current Parental Order and Adoption certificates, should be replaced with one certificate called a ‘certificate of legal parentage’.²²³ This would be introduced for all official purposes and would include a statement that it is a record of legal parentage only and that information about any additional records concerning genetic and/or gestational parentage will be provided on request.²²⁴ It seems that in the case of surrogacy, the intended parents would be recorded on the child’s ‘certificate of legal parentage’. When surrogacy conceived individuals make enquiries to the GRO, it would clarify that:

²²⁰ *Ibid.*

²²¹ *Ibid*, p2.

²²² *Ibid.*

²²³ *Ibid*, p3.

²²⁴ *Ibid.*

‘(i) where surrogacy was involved then a gamete donor or donors may also have been used; and (ii) that where the enquirer had been born overseas or through informal arrangements then information may be lacking’.²²⁵

The underlying rationale for this particular model, as opposed to annotating the birth certificate, seems to be the right to privacy for donor-conceived people and their parents.²²⁶ However, the main problem with this model is that everyone’s birth certificate, whether donor / surrogacy conceived or not, will include a statement that the ‘certificate of legal parentage’ is a record of legal parentage only and that information about any additional records concerning genetic and / or gestational parentage will be provided on request. This still relies on parental disclosure, because if everyone’s birth certificate has the same statement, a surrogacy / donor conceived person will not be put on notice to access the additional records about their genetic and / or gestational parentage. As such, there needs to be informed debate about whether the birth certificate should include all three groups of parents outlined by Crawshaw: genetic parents, gestational parents, and the child’s social intended parents. In the case of double donation, this would include the names of the egg donor, sperm donor, surrogate and intended parent(s). It could be made clear that only the intended parents have legal parenthood and parental responsibility.²²⁷ The other groups are recorded to give the child information about their conception, rather than to give parental rights and responsibilities to these groups.

5.5 Conclusion

The first part of this chapter demonstrated how assigning legal motherhood to the surrogate is not necessarily in the best interests of the child. Interviews with Sophie, Sally, Lauren and Rosie, who all had children through surrogacy, revealed a sense of vulnerability whilst waiting for legal parenthood to be assigned to them through a parental order. It is suggested that legal parenthood should be assigned to the intended parents much earlier to ensure that the child’s parents have the parental rights to look

²²⁵ *Ibid.*

²²⁶ *Ibid.*, p4,

²²⁷ Unless all parties (i.e. the intended parents, surrogate and / or donor) plan to raise the child together, in which case legal reforms are needed to allow for multiple parenthood in the UK.

after their children. It would be best to assign legal parenthood to the intended parents at the point of birth. This would resolve the issue of the surrogate's autonomy being compromised whilst the child is still in utero.

It was also considered whether legal parenthood could be assigned to the surrogate and intended parents, therefore necessitating a change in the law to accommodate more than two legal parents. This may be useful where a dispute arises between the surrogate and intended parents,²²⁸ or where the parties decide that they all want to raise the child.²²⁹ However, it is suggested that in the majority of cases assigning legal motherhood to the surrogate does not reflect the parties' intentions. Two of the intended mothers interviewed for this project explained that their surrogate did not see themselves as the child's parent and did not want to be tasked with any parental obligations. Although these views came from the intended parents (rather than the surrogates) this resonates with Imrie and Jadvá's study which indicates that the surrogate does not view the child as their own child.²³⁰ It is suggested that policy-makers should develop a legal presumption of parenthood in favour of the intended parents.

The second part of this chapter revealed that the genetic requirement in section 54(1)(b) HFEA 2008 marginalises social parenthood, which was deemed to be a natural form of parenthood in *Re G*.²³¹ Despite this, surrogacy regulation marginalises the child's social (non-genetic) parent when the surrogacy agreement breaks down. *CW v NT and another*²³² and *H & S*²³³ are prime examples of this. Furthermore, *JP v LP & Others*²³⁴ illustrates how the non-genetic intended parent is at risk of marginalisation from the child's life when his / her relationship breaks down with the second intended parent (who has a genetic link to the child). JP had no parental

²²⁸ S Oultram, *op cit*, n11.

²²⁹ For example, *A.A. v. B.B.*, (2007) 83 O.R. (3d) 561 (C.A.) [*A.A. v. B.B.*], where all parties wanted to raise the child from the outset.

²³⁰ S Imrie and V Jadvá, *op cit*, n80.

²³¹ *Op cit*, n1.

²³² *Op cit*, n13.

²³³ *Op cit*, n13.

²³⁴ *Op cit*, n14.

responsibility or legal parenthood to reflect her role as the child's social mother. It is the child who loses out from their main caregiver not having legal parenthood; the child's mother in *JP v LP & Others* had no power to make decisions on behalf of the child, including consent to medical treatment. The final part addressed the concern that removing sections 33 and 43(1)(b) HFEA 2008 could compromise the child's right to identity. For example, if the surrogate is no longer recorded on the child's birth certificate as the legal mother and a donated embryo is used, the child may not be given information about their genetic and gestational 'parents'. However, it is concluded that early parental disclosure and reforms to the birth registration system in the UK²³⁵ would help to address this risk. Therefore, there should be a presumption that the intended parents, irrespective of genetic link, are the legal parents of the child.²³⁶ This would not only be fairer to the parties concerned but would also reflect the child's reality.

²³⁵ Crawshaw *et al.*, *op cit*, n18.

²³⁶ This could be rebutted where the parties agree that the child should have more than two legal parents; where the intended parents intentions change; or where it is in the best interests of the child to be raised by the surrogate (or another adult).

6. Facebook Groups, Vulnerable Surrogates and Fractured Dreams of Parenthood: How Should Regulation Respond to ‘Do-It-Yourself’ Surrogacy Arrangements?

6.1 Introduction

The option to meet surrogates online and through other informal means, gives the impression that ‘do-it-yourself’ (DIY) surrogacy arrangements offer a simple and quick way to become parents. This type of arrangement is not facilitated or arranged by a non-profit organisation like Childlessness Overcome Through Surrogacy (COTS), Surrogacy UK (SUK), or Brilliant Beginnings (BB). Although the parties might initially sign up with a non-profit organisation, they do not use the help or support of the organisation throughout the surrogacy and may originally meet through a secret online social chat group (e.g. Facebook).

DIY arrangements are appealing for intended parents, who can circumvent the lengthy waiting lists for joining a non-profit organisation, meet a wider range of surrogates, and avoid the watchful eye of a professional organisation. However, this chapter aims to demonstrate how DIY arrangements can go wrong and, when they do, the problems outweigh any procreative freedom the intended parents hoped to achieve by ‘going it alone’. DIY arrangements can cause intended parents and surrogates to fall out, resulting in disputes about who the child’s legal parent(s) should be.¹ This environment of acrimony is not conducive to supporting the child’s best interests and welfare.² Informal arrangements also create conditions in which surrogates can be

¹ See for example, *Re Z (Surrogacy agreements) (Child arrangement orders)* [2016] EWFC 34. Hereafter ‘*Re Z (Surrogacy agreements)*’. See also *CW v NT and another* [2011] EWHC 33 which was discussed in the previous chapters.

² See *H v S (Surrogacy Agreement)* [2015] EWFC 36, where the surrogate breastfed and co-slept with the child to minimise the intended father’s contact with his child, [18] (Russell J). Hereafter ‘*H v S*’.

exploited,³ a concern usually reserved for foreign surrogates from poorer socio-economic countries, including India.⁴

The first part of this chapter explores two types of informal DIY arrangements: (1) arrangements entered into between friends, and (2) arrangements entered between strangers through online platforms like 'Facebook'. Interviews with three mothers involved with this project, Sophie, Rosie and Lauren, are used to evaluate the processes involved with COTS and SUK. Their experiences will be compared with those of Bea, who entered into a surrogacy agreement using a secret 'Facebook' group. The next part of this chapter looks at the consequences of DIY arrangements for surrogates. It is suggested that the prohibition on commercial surrogacy following the Surrogacy Arrangements Act 1985 (SA Act) has been counter-productive. One of the main aims of the legislation was to prevent both the exploitation of women, and the commodification of children. The prohibitive legislation is, at least in part, responsible for driving intended parents into DIY arrangements and international commercial surrogacy agreements overseas. One of the main problems is the shortage of surrogates in the UK which is driving UK couples into DIY and international arrangements.⁵ The case of '*Re Z (Surrogacy agreements)*',⁶ delivered by Russell J, is used to show how exploitation is an emerging issue in the UK; the casual nature by which surrogates and intended parents can now meet and enter into an informal agreement has led to an environment where exploitation thrives. Wertheimer's⁷ accounts of exploitation are used to evaluate the various aspects of DIY arrangements.

³ '*Re Z (Surrogacy agreements)*', *op cit*, n1.

⁴ See generally, K Schanbacher 'India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women' 25, *Hastings Women's Law Journal*, 201 2014; C Thomale, 'State of play of cross-border surrogacy arrangements—is there a case for regulatory intervention by the EU?', *Journal of Private International Law*, 2017; and S Saravanan, 'An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India', *Philosophy, Ethics, and Humanities in Medicine* 2013, 8:10.

⁵ 'Childless UK Couples Forced Abroad to Find Surrogates', *The Guardian*, 20th February 2016, <<https://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogates>> (last accessed 16/09/18).

⁶ *Op cit*, n1.

⁷ A Wertheimer, 'Two Questions About Surrogacy and Exploitation', *Philosophy & Public Affairs*, Vol. 21, No. 3 (Summer, 1992), pp. 211-239.

In light of the serious problems caused by DIY arrangements, for both the surrogate and intended parents involved, the final part of this chapter suggests that a new form of regulation is required. It is considered whether the Human Fertilisation and Embryology Authority (HFE Authority) should have a role in licensing and regulating non-profit surrogacy organisations like COTS, SUK and BB. It is also questioned whether regulation alone is sufficient to persuade intended parents to forgo the ‘DIY’ route, or whether certain incentives, such as a pre-birth order for those who use a licensed surrogacy organisation, would be required.

6.2 Comparing DIY Arrangements with those Arranged through Non-Profit Organisations

This section looks at three types of surrogacy arrangements, two of which are DIY arrangements. The first DIY arrangement looked at are those entered into by intended parents and surrogates, who are friends. This type of arrangement arose in *H v S*,⁸ the problems of which are discussed shortly. The second type involves DIY arrangements entered into by strangers over the internet. This arose in *CW v NT and another*,⁹ and was the route taken by one of the intended mother’s interviewed for this thesis, Bea. The third type of arrangement is more formal, and involves not for profit surrogacy agencies, such as COTS, SUK, or BB. The differences between these three routes are explored in order to evaluate which option better protects the intended parents and children involved.

(I) Informal DIY Arrangements between Friends: ‘The Lack of a Properly Supported and Regulated Framework’¹⁰

The first type of DIY surrogacy arrangement discussed here involves those entered between friends. This type of DIY arrangement arose in the case, ‘*H v S*’, which concerned the future arrangements for a baby girl (M) who was born as a result of artificial or assisted conception and of an agreement – ‘the basis of which is highly

⁸ *Op cit*, n2.

⁹ *Op cit*, n1.

¹⁰ *H v S*, *op cit*, n2.

contested’¹¹ – between S (the 1st Respondent, the mother) and H (the 1st Applicant, the father), and B (the 2nd Applicant) his partner. The child’s father, H, ‘was in a long-term and committed relationship with B’.¹² H and B argued that they had an agreement with S that she would act as a surrogate and that H and B would co-parent the child, but that S would continue to play a role in the child’s life.¹³ S argued that she and H entered an agreement that excluded B, and that H would be, in effect, a sperm-donor.¹⁴ S claimed that she planned to take on the role of M’s main parent and carer.¹⁵ Throughout the proceedings S ‘vociferously rejected’¹⁶ B playing any parental role in M’s life.¹⁷ Russell J stated:

‘Very sadly this case is another example of how “agreements” between potential parents reached privately to conceive children to build a family go wrong and cause great distress to the biological parents and their spouses or partners...’.¹⁸

Russell J criticised ‘the lack of a properly supported and regulated framework’¹⁹ for private DIY arrangements and noted that arrangements of this kind have ‘inevitably, lead to an increase in these cases before the Family Court.’²⁰ H and B sought parental responsibility through a child arrangement order and wanted M to live with them; letting S spend time with M on occasion. S asked for an order that M should live with her. Russell J found that it was in M’s best interests to live with her father, H, and his partner, B. She reached that conclusion ‘having had regard throughout to the welfare checklist and to M’s interests now and in the long term’.²¹

¹¹ [1] (Russell J).

¹² [1] (Russell J).

¹³ [1] (Russell J).

¹⁴ [1] (Russell J).

¹⁵ [1] (Russell J).

¹⁶ [1] (Russell J).

¹⁷ [1] (Russell J).

¹⁸ [2] (Russell J).

¹⁹ [2] (Russell J).

²⁰ [2] (Russell J).

²¹ [126] (Russell J).

As S denied acting as a surrogate and refused to consent to the intended parents' application for legal parenthood, the legislation governing surrogacy played no part in the case. Nevertheless, the case demonstrates how informal DIY assisted conception arrangements can frustrate the intentions of those involved. The case raises serious concerns about whether UK surrogacy regulation adequately protects the procreative rights and intentions of intended parents who enter DIY arrangements in this way. Russell J found on the balance of probabilities that S, had:

‘[d]eliberately misled the Applicants in order to conceive a child for herself rather than changing her mind at a later date. Having at first encouraged H to be involved S was already trying to exclude H not long before M was born from involvement with the birth and with the child.’²²

This must have caused immeasurable disappointment for the applicants because it was clear that H had ‘so desperately wanted a child’.²³ S had also consistently done all she could ‘to minimise the role that H had in the child’s life’²⁴ and Russell J criticised her for acting as a ‘woman determined to treat the child as solely her own’.²⁵ S ensured that H was not at the hospital when M was born; she registered the birth without putting H on the certificate and did not give the child any names except those chosen by her and did not reflect the child’s paternal family names in that choice.²⁶ As such, there is no protection for those in H and B’s position. H had thought carefully about having a child and the emails he exchanged with S in 2012 illustrated ‘his awareness of the difficulties that would be encountered as well as a clear expression of his very great desire to have a child; and to have that child with B.’²⁷

²² [55] (Russell J).

²³ [55] (Russell J).

²⁴ [56] (Russell J).

²⁵ [56] (Russell J).

²⁶ [56] (Russell J).

²⁷ Russell J concluded that the child should live with H and B and made a Child Arrangements order to that effect. This gave H and B parental responsibility, [123]. For discussion about why this is an inadequate solution for B and the child, see chapter 3.

It is suggested that one potential solution would be for legislation and policy-makers to actively discourage informal arrangements of this kind.²⁸ Policy-makers could develop incentives for surrogates and intended parents to register with a recognised non-profit surrogacy organisation (e.g. SUK, COTS or BB) and work with the organisation throughout the surrogacy. This should be the case even where the surrogate and intended parents are friends. This would ensure that the parties have a more structured framework and the support and expertise of a professional organisation. There is still a risk the surrogate would change her mind, but this would be less likely given the safeguards in place with professional organisations, which are discussed in subsection (III).

(II) DIY Arrangements Facilitated by the Internet: The Problems with Secret Facebook Sites and Other Online Forums

A further worrying development is the rise of DIY surrogacy arrangements established through the internet. DIY arrangements conducted through social media platforms, including 'Facebook', create a risk that intended parents (and surrogates) will be exploited. Baker J summarised the problem in *CW v NT and another*:²⁹

‘Negotiating a surrogacy arrangement on a commercial basis is a criminal offence in this country. A number of agencies have been set up to facilitate surrogacy arrangements by making appropriate introductions, and providing advice and counselling to the parties. Those agencies have to be careful to ensure that the rules prohibiting commercial transactions are respected. [H]owever, the advent of the internet has facilitated the making of informal surrogacy arrangements between adults. In such cases, those entering the arrangement do not have the advantage of the advice, counselling and support that the established agencies provide.’³⁰

²⁸ Part 6.3 develops this argument.

²⁹ *Op cit*, n1.

³⁰ [2] (Baker J).

One example of an internet surrogacy arrangement gone wrong, involved a UK woman, Greenslade, pretending to be a surrogate.³¹ In 2004 Greenslade made £2,500 before her attempt at successive sales of her baby was unmasked. One of her victims, who paid a £1,500 deposit on a £9,000 contract for the child, had suffered 13 miscarriages. Greenslade had advertised on a website for surrogates and targeted up to five respondents.

Surrogacy chatrooms are readily accessible through open and closed groups on social media sites including 'Facebook' which means that exploitation can arise for both surrogates and intended parents. Another recent case involved Samantha Brown³² who took £8,000 from a couple after promising to be a surrogate for them. Brown pretended she lost the baby in a car accident. UK surrogacy regulation should not allow this kind of abuse and exploitation to take place, and it is suggested that requiring all parties to register with and meet through an accredited non-profit surrogacy organisation would reduce this risk.

(a) *CW v NT and another*³³

The problems with DIY surrogacy arrangements, initiated via the internet, are seen in the startling case of *CW v NT and another*, concerning a baby girl called 'T'. In 2009, T's 'mother' met a couple ('Mr and Mrs W') over the internet and agreed informally that she would be inseminated by Mr W and hand the baby to the W's after he / she was born.³⁴ Baker J described the W's as 'frequent visitors to surrogacy websites'.³⁵ The first contact between the mother and the W's came on 17th July 2009 when the mother emailed Mr W in these terms:

³¹ 'Woman who Sold Baby Three Times is Jailed' available at http://www.bionews.org.uk/page_11960.asp (last accessed 21/04/16).

³² The Telegraph, "Couple Conned by Fake Surrogate Mother's Baby Lies", <http://www.telegraph.co.uk/news/health/news/12117244/Couple-conned-by-fake-surrogate-mothers-baby-lies.html> (accessed 07/05/16).

³³ *Op cit*, n1.

³⁴ [11] (Baker J).

³⁵ [44] (Baker J).

‘hello sweetie my name is [name given] and I am a surrogate mother in the UK I read our [sic] ad on yedda [the surrogacy website] and I am truly interested in helping you to make your family complete. I hope you contact me back and I can tell you all about me.’³⁶

After receiving this, the W’s got in contact with the mother. Subsequently, the mother became pregnant and received several thousand pounds from the intended parents during the pregnancy.³⁷

However, during the pregnancy relations between the parties deteriorated and a friend of the mother’s telephoned Mrs W and told her that the mother had changed her mind, and wanted to keep the baby.³⁸ Despite the criticisms and findings about the mother, Baker J acquitted her of the charge that she deliberately set out to deceive the W’s from the outset.³⁹ Having listened carefully to her evidence, Baker J did not believe that the mother entered the surrogacy arrangement with the fixed intention of keeping the baby.⁴⁰ He accepted her evidence that she changed her mind about this matter during the course of the pregnancy. Nevertheless, the W’s dream to become parents and raise the child, was clearly frustrated by the DIY arrangement, and it is suggested that this would not have happened if regulation actively encouraged the parties to meet through a more formal platform like COTS, SUK or Brilliant Beginnings.

Moreover, Mr and Mrs W’s general use of the internet in the context of surrogacy was concerning. The couple were registered on several surrogacy websites and there had already been one occasion involving a South African woman living in Wales who had disappeared after they had paid her £1000.⁴¹ This shows how unregulated arrangements expose the intended parents to exploitation and extortion as their desire to become parents makes them vulnerable. Baker J was concerned about ‘the dangerous and murky waters into which they, and particularly Mrs W, have strayed

³⁶ [10] (Baker J).

³⁷ [3] (Baker J).

³⁸ [15] (Baker J).

³⁹ [34] (Baker J).

⁴⁰ [34] (Baker J).

⁴¹ [8] (Baker J).

via the internet'.⁴² He was particularly worried about the W's involvement with a woman known to them as 'D' but known to the police and social services in Scotland, as 'CL'.⁴³ Mrs W said she came across CL on an internet chatroom. CL told Mrs W that she was a victim of domestic violence and as Mrs W was a victim of similar violence in the past, she offered CL 'refuge for a few weeks'.⁴⁴ CL arrived at the W's home where she stayed for about two weeks and it was alleged that she had a tattoo across her chest reading 'Porn Princess'.⁴⁵ At some point during her stay, social services visited the W's home looking for CL, and 'it was at this point that her true identity was revealed'.⁴⁶ Shortly afterwards, CL left the W's property.

It transpired that CL is a prostitute, with seven children in care in Scotland.⁴⁷ She is known on the internet as a surrogate and claims to have 13 children.⁴⁸ She left Edinburgh when pregnant with her sixth child and went to stay with the W's in England.⁴⁹ When social workers visited the Ws' home, Mrs W told her that the woman she knew as D was someone she had met over the internet. The social workers were 'concerned that the Ws might have arranged to take over the baby that CL was carrying'.⁵⁰ This creates serious child safeguarding issues because it suggests that the W's planned to take CL's child without informing social services. Baker J was unconvinced by the Ws' evidence about CL and did not believe Mrs W's denial that she met CL through a surrogacy website:

'Given the shared interest in surrogacy, I think it probable that it was this, rather than domestic violence, that brought them together ... I find that Mrs. W came across her via a surrogacy website.'⁵¹

⁴² [38] (Baker J).

⁴³ [38] (Baker J).

⁴⁴ [39] (Baker J).

⁴⁵ [39] (Baker J).

⁴⁶ [39] (Baker J).

⁴⁷ [40] (Baker J).

⁴⁸ [40] (Baker J).

⁴⁹ [40] (Baker J).

⁵⁰ [40] (Baker J).

⁵¹ [42] (Baker J).

Furthermore, Baker J was ‘struck by their [the W’s] inability to appreciate the risks that arose by inviting a person like CL into their house’.⁵² In doing so, the W’s not only put themselves at risk of exploitation (they had already had money taken off them from a South African woman living in Wales, pretending to be a surrogate) but crucially, put their children at risk. As Baker J explained, ‘it cannot be said too strongly that it is extremely unwise to invite someone into your home whom you have only met over the internet.’⁵³ It seems the W’s desperation to have a child through surrogacy made them lose sight of their responsibility for their existing children. Clearly, DIY arrangements are problematic for the intended parents whose plan to become parents can be thwarted. These arrangements also raise welfare concerns for any existing children, when strangers found online are introduced (without the kind of checks or screening provided by SUK / COTS / BB) and invited inside the family home. As such, DIY arrangements must be discouraged by new regulation.

(b) Secret Facebook Groups: Bea’s Surrogacy Journey

One of the intended mothers interviewed for this project, Bea, had twins through surrogacy and met her surrogate on a ‘secret Facebook group’.⁵⁴ She had ‘Crohn’s’ disease and had a lot of operations on her abdomen which resulted in her fallopian tubes being damaged. Bea and her husband decided to use surrogacy to have children and joined COTS. However, they met their surrogate ‘on one of the secret Facebook groups’. The surrogate was also with COTS but they were not introduced by the organisation. Once the parties had met on the secret Facebook group, they entered into a COTS agreement. During the interview, Bea revealed that there were lots of intended parents and surrogates ‘on Facebook and it seemed that people were meeting that way rather than waiting for a COTS match.’⁵⁵

⁵² [43] (Baker J).

⁵³ [43] (Baker J).

⁵⁴ Interview 01IM, recorded on 15/07/16 (on file with the author).

⁵⁵ *Ibid.*

Bea and her husband, Jack, applied for a parental order in respect of their twins, and this was awarded by the court. However, she explained that her surrogacy journey was not a smooth one. Whilst everything was exciting when the parties first met, the relationship between the intended parents and surrogate deteriorated during the pregnancy. One source of tension was the surrogate's use of social media:

'If she wasn't feeling very well she'd post it on the Facebook group and I'd read it on there, rather than her telling me that she wasn't feeling very well. All sorts about the pregnancy and how she was feeling she'd put on Facebook rather than telling me. So really I'd feel a bit like an outsider in what was a pregnancy which I really ought to have been a part of ... we really wanted to be involved and it felt like she was keeping us out of it a bit.'⁵⁶

When the children were born, they were in incubators on a specialist ward. Bea felt that the surrogate suddenly wanted to be on the unit a lot. She believed that the surrogate and her husband wanted to observe her going through a difficult period and would have appreciated 'bit of space at that point ...' to help her bond with the children.⁵⁷ It is argued that the tension created when DIY arrangements go wrong, frustrates the child's need to 'grow up in a family environment, in an atmosphere of happiness, love and understanding,'⁵⁸ which is crucial for the harmonious development of his / her personality. It is not conducive to the child's best interests for his / her life to start with conflict. Bea also described the parental order process as a 'nightmare' because their surrogate 'just wouldn't speak to CAFCASS'.⁵⁹ This meant the intended parents had to wait for the surrogate to consent to the parental order and did not receive the children's long birth certificate until the children were 18 months old. This meant the children were being cared for by Bea and her husband, but they had no legal parenthood to reflect this until the parental order was awarded. Awarding legal parenthood to the intended parents at the moment of the child's birth,

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Preamble to the CRC.

⁵⁹ Interview 01IM, recorded on 15/07/16 (on file with the author).

a suggestion advocated in the previous chapter, would provide more certainty to parents like Bea who found herself at the whim of the surrogate.

In light of these problems, Bea was asked whether she should have found her surrogate using a different channel. Bea replied:

‘...You’d bite anyone’s hand off that offered because you’re desperate and there aren’t enough people willing to do it. I think we would do it again, we’d do it all the same again because we’ve got our children now.’⁶⁰

This demonstrates that intended parents are aware of the risks with the DIY route but feel they do not have any other option if they are to become parents. The desperation intended parents feel means they are open to as much exploitation as surrogates. Given the shortage of UK surrogates, meeting one through an informal platform, without checks or screening, may be some intended parents’ only option to create a family.

(III) Surrogacy Arrangements with not for profit surrogacy agencies

This section draws upon the empirical work carried out for this thesis to evaluate the processes involved in COTS and SUK. The aim is to show how the processes involved with non-profit organisations provide more support and security for intended parents and surrogates than DIY arrangements.

(a) COTS

One of the intended mothers interviewed for this project, Sophie, entered into a surrogacy arrangement using COTS, a non-profit organisation which was founded in 1988 by Kim Cotton. Its primary objective is to:

‘Pass on our collective experience to surrogates and would be parents, helping them to understand the implications of surrogacy before they enter into an arrangement and to deal with any problems that may arise during it.’⁶¹

⁶⁰ *Ibid.*

⁶¹ <https://www.surrogacy.org.uk/> (Last accessed 04/06/18).

Sophie and her husband joined COTS and were eventually matched with a surrogate. The IVF worked, and the surrogate became pregnant ‘quite quickly’. Sophie still had reservations with using COTS because ‘they’re limited in what they can do’ and there is a ‘shortage of surrogates compared to the vast number of parents that are... hoping to become parents’.⁶²

The reason Sophie chose COTS (over other not for profit agencies such as SUK), was that the former asks the intended parents to write a profile, which is sent to the surrogates who are available at the time. The surrogate then reviews the profile and if she is interested, the surrogate informs COTS, who will then put the parties in touch. Sophie commented that:

‘I kind of liked that ... means of introduction because I really like writing and thought that I could write my story well and hope that somebody would want to get to know us from reading our story...’.⁶³

Sophie described herself as being ‘so lucky with our surrogate’.⁶⁴ The parties wrote a non-enforceable agreement and both sides ‘honoured that agreement completely’.⁶⁵ COTS provided the template for the agreement and set up an agreement meeting where the intended parents and surrogates went through it in a more formal way. The parties agreed upon everything, including reasonable expenses, what would happen in the event of a miscarriage or multiple pregnancies, how much contact the intended parents and surrogates are to have during, and after the pregnancy, and the arrangements for birth. One of the clear benefits of going through COTS or SUK, is the parties are given the chance to communicate their expectations of each other and think about what will happen if problems arise.

Furthermore, one of the benefits of a profile is that the parties know each other’s values from the very beginning:

⁶² Interview 02IM, recorded on 09/07/16 (on file with the author).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

‘So Z [the surrogate] had said right from the beginning even in her profile for COTS that she really wanted the parents to be at the birth and ... obviously we really wanted that as well. We were delighted that [she] wanted us to be there and that was agreed from the outset.’⁶⁶

By contrast, where parties meet informally through the internet, they do not necessarily write a ‘profile’ and get to know each other’s story and values in the same way. This could explain why Sophie’s surrogacy journey was less complicated than Bea’s, who met her surrogate through a secret Facebook group. According to the organisation’s website, COTS require that surrogates and intended parents have a meeting with a support worker before going on the ‘active list’ of Triangle.⁶⁷ Triangle is a splinter organisation which puts surrogates and intended parents in touch. The support workers ensure that ‘all parties understand the implications of surrogacy and are going into the arrangement with their eyes open’.⁶⁸

Having a support worker who helps the parties understand the agreement, and the consequences of surrogacy, is not a feature of DIY arrangements. COTS also require surrogates and intended parents to have up to date medical tests and Criminal Record Checks,⁶⁹ another feature absent from the DIY context. Moreover, ‘all active surrogates and intended parents receive monthly phone calls from a COTS Support Worker’,⁷⁰ who gives practical advice and moral support. The structured framework operated by COTS is missing from the DIY context, which could explain why more problems arise with the latter.

(b) Surrogacy Arrangements with SUK

Another non-profit surrogacy organisation operating in the UK, is SUK. The website for the organisation states that the ethos is ‘surrogacy through friendship’:

⁶⁶ *Ibid.*

⁶⁷ *Op cit*, n61.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

‘Through our organisation, Surrogates and Intended Parents can meet one another and form the friendships that can lead to dreams coming true. We are here to help and support you through all stages of your surrogacy journey’.⁷¹

Lauren, an intended mother who had a child using surrogacy, used this organisation. She found out when she was 15 that she had a congenital absence of the uterus and would never be able to get pregnant or carry her own child. For Lauren, ‘surrogacy was the only option that she wanted to pursue to have a family’.⁷² She started by researching surrogacy online and she and her husband came across two organisations, COTS and SUK. They contacted both, and SUK responded first.

Lauren and her husband went along to one of SUK’s socials to find out how SUK worked and ‘knew absolutely that that was the organisation for us.’⁷³ Lauren explained that:

‘The ethos of SUK is surrogacy through friendship and the emphasis is on the relationship between the surrogate and the intended parents, and investing in a genuine bond ... Some people see each other after the surrogacy every three months or every year. It doesn’t matter how it manifests but it should be a genuine bond of friendship and trust.’⁷⁴

This ‘friendship first’ ethos explains why Lauren had an excellent relationship with her surrogate. Lauren’s surrogate came to a SUK social to meet Lauren and her husband, and to find out if they were the same as they appeared from their profile and diaries on the SUK message board. The parties were introduced, and Lauren talked with her surrogate for ‘12 hours’ and compared it to meeting her husband or ‘the one’.⁷⁵ She said, ‘we just instantly connected and knew there was something very special in the relationship’.⁷⁶

⁷¹ <https://www.surrogacyuk.org/> (last accessed 08/06/18).

⁷² Interview 07IM, recorded on 15/07/16 (on file with the author).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

Lauren and her husband decided they wanted to get to know the surrogate. SUK operate a minimum three month getting-to-know period, but Lauren and her husband spent six months getting to know their surrogate where they spent a lot of time together ‘getting to know each other’s family and ... building up trust.’⁷⁷ Again, this getting-to-know period does not necessarily occur when parties meet through informal means. Unlike DIY arrangements entered via the internet, Lauren described the SUK joining process as ‘really rigorous’. At the end of the get-to-know period, Lauren, her husband, and their surrogate sat down as a team, with a mediator from SUK where they went through an agreement form. This covered ‘every single aspect of surrogacy, diet to levels of contact during, before and afterwards’.⁷⁸

Rosie, another intended mother whose surrogate was pregnant at the time of the interview, also used SUK.⁷⁹ Like Lauren, she explained that she ‘had to talk about a million and one different scenarios’⁸⁰ and the things she and her surrogate agreed on, which confirms the rigour of the SUK process. Rosie, her husband, and their surrogate all received a copy of the documents and the non-binding agreement, which the parties sign to indicate that they are ‘happy and it [the agreement] properly represented what you’d spoken about and how you feel’.⁸¹ Once this process is completed, the parties can then start treatment and attempt to get pregnant.

With informal DIY arrangements the parties do not necessarily spend time getting to know one another. Moreover, the parties to a DIY arrangement do not sit down as a team with a mediator or go through every single aspect of the agreement. In ‘*Re Z (surrogacy agreements)*’,⁸² the intended parents already had twins, via surrogacy, six months before entering a new surrogacy arrangement. The intended parents met the first surrogate, ‘V’:

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Interview 03IM, recorded on 11/07/16 (on file with the author).

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Op cit*, n1.

‘In a services area in a “restaurant off the motorway in the West Midlands” and, that at the meeting which lasted 3-4 hours, they had discussed “the agreement and who we were”. They had signed an agreement at that meeting and that had constituted “matching”’.⁸³

As a result, the parties knew hardly anything about each other. The applicants ‘met’ V online or on Facebook in late September 2011 and they ‘knew very little about V relying instead on the views of L who was also involved in the surrogacy forum’.⁸⁴ Once introduced the intended parents and V ‘had become further acquainted online and arranged to meet in person’.⁸⁵ The purpose and focus of this first meeting, was not to get to know one another, but ‘to sign the surrogacy agreement’.⁸⁶ As such, ‘it was abundantly clear that A and B knew very little at all about V, her circumstances or her motivation for acting as their surrogate when they signed the agreement with her.’⁸⁷ The DIY arrangement between A, B and V did not involve any getting-to-know period or the ‘friendship first’ ethos adopted by SUK. Instead the parties rushed into an agreement at a time when the surrogate had financial troubles and had just separated from her partner. It is unsurprising that the relationship broke down and led to problems.

When asked whether SUK is a better option than intended parents ‘going it alone and trying to find a surrogate through Facebook ... where you don’t have the same kind of support’, Lauren believed so. She said:

‘I know that people have successful surrogacy arrangements through independent Facebook groups. But I believe the risk of things going wrong is much higher.’⁸⁸

She explained that at SUK parties must undergo a lot of checks before becoming a member and have detailed membership sessions with experienced surrogates and intended parents. SUK also flag any concerns about the parties understanding of

⁸³ [32] (Russell J).

⁸⁴ [31] (Russell J).

⁸⁵ [32] (Russell J).

⁸⁶ *Ibid.*

⁸⁷ [33] (Russell).

⁸⁸ Interview 07IM, recorded on 15/07/16 (on file with the author).

surrogacy and parties must have background checks, a Disclosure and Barring Service check (DBS), Sexually Transmitted Infection (STI) test, medical tests and General Practitioner (GP) letters. In addition to these checks, Lauren explained that the surrogate and intended parents also ‘have access to hundreds of people who are going through it or gone through it’⁸⁹ and each party has an individual support worker who can be contacted anytime:

‘If there are issues in your journey the support workers and trustees who are experienced mediators can intervene to support and help people reach the best possible outcome. So you’ve got a lot more checks, balances, support and best practice going through an organisation like SUK.’⁹⁰

By contrast, this level of support is missing from informal DIY arrangements. Bea’s surrogacy journey, which started through a secret Facebook group, shows how small problems such as the surrogate posting too much information on Facebook, rather than communicating with the intended parents, can escalate; the surrogate in that case, for instance, refused to talk to the CAFCASS officer and made the parental order process difficult. If Bea had the level of support offered by SUK, including a mediator, this problem could have been resolved before it had the chance to spiral. Ultimately, the procreative liberty intended parents believe they can achieve through DIY arrangements is illusory. It is important to acknowledge that while not for profit surrogacy agencies are a better route than DIY arrangements, they can still make serious errors which result in the child being left without a parental order.⁹¹

6.3 DIY Arrangements and the Exploitation of Surrogates in the UK

The procreative liberty intended parents hope to achieve through DIY arrangements also comes at a cost to the surrogate involved. The exploitation of surrogates has largely been associated with the women in international commercial surrogacy arrangements, especially those from poorer socio-economic countries like India.⁹²

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) which is discussed below.

⁹² *Op cit*, n4.

This has resulted in multiple efforts across different jurisdictions to limit reproductive tourism.⁹³ In 2014, the European Parliament condemned the practice of gestational surrogacy on the basis that it ‘involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries ...’.⁹⁴ Furthermore, in its ‘project on parentage / surrogacy’,⁹⁵ the Hague noted the broader concerns arising from surrogacy included, ‘the potential for exploitation of women, including surrogate mothers.’⁹⁶

The same concerns of exploitation are not associated with today’s UK surrogates. In 1984, *The Warnock Committee* condemned surrogacy and was concerned with the exploitation that could arise from the practice.⁹⁷ The subsequent SA Act 1985 prohibited what policy-makers perceived to be the key causes of exploitation and commodification of children: enforceable contracts,⁹⁸ advertising,⁹⁹ and commercial payments.¹⁰⁰ There is an assumption that the current model of regulation, which is modelled on altruistic surrogacy, sufficiently protects surrogates from the kind of exploitation encountered by those in international commercial arrangements. This assumption is also held by intended parents too. Sophie, who entered a surrogacy

⁹³ See for example India. The Guardian (3rd January 2016) “‘We pray that this clinic stays open’: India’s surrogates fear hardship from embryo ban” <https://www.theguardian.com/world/2016/jan/03/india-surrogate-embryo-ban-hardship-gujarat-fertility-clinic> (last accessed 15/06/18).

⁹⁴ European Parliament, Plenary Sitting, *Annual Report on Human Rights and Democracy in the World 2014 and the European Union’s policy on the matter* (2015/2229(INI)), 30th November 2015, A8-0344/2015. Available at, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+REPORT+A8-2015-0344+0+DOC+PDF+V0//EN> (last accessed 11/05/18). See para 114.

⁹⁵ See <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (last accessed 07/06/18).

⁹⁶ Hague Conference on Private International Law, ‘Report of the February 2016 Meeting of the Experts’ Group on Parentage / Surrogacy’, at para 15 <<https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf>> (last accessed 07/06/18).

⁹⁷ M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter, ‘*The Warnock Report*’.

⁹⁸ Section 1A SA Act 1985.

⁹⁹ Section 3 SA Act 1985.

¹⁰⁰ Section 2 SA Act 1985.

arrangement using COTS was put off from using international surrogacy because of concerns with exploitation. She said:

‘I don’t think we could ever really kind of feel comfortable with some of the kind of issues ... would surrogacy be safely and ethically practised in all of the locations and would the surrogate definitely be doing it freely and ... be supported properly through it by friends and family?’¹⁰¹

This highlights how exploitation is not associated with altruistic surrogacy in the UK. However, DIY arrangements, and the increasing use of the internet to facilitate this mode of arrangement, have created the conditions for exploitation to arise.

The meaning of ‘exploitation’ is ambiguous and contested. Wertheimer explains ‘we typically say that A wrongfully exploits B when A takes unfair advantage of B’.¹⁰² According to Wertheimer, to see whether an ‘unfair advantage’ has arisen, we must look at two dimensions of the transaction: (1) the dimension of value and, (2) the dimension of choice.¹⁰³ With respect to the ‘dimensions of value’, the transaction is exploitative where A benefits from the transaction but it is harmful or unfair to B.¹⁰⁴ With respect to the dimension of choice, A exploits B only when B’s choice is somehow compromised.¹⁰⁵ Wertheimer applies the dimensions of value and choice to surrogacy and suggests there are three types of exploitation. The first is ‘harmful exploitation’. On this account, ‘surrogacy is exploitative because the intended parents gain from the transaction while the surrogate is—on balance—harmed.’¹⁰⁶ The second account is ‘mutually advantageous exploitation’ whereby ‘the surrogate gains from the transaction but in a way that is unfair to her, perhaps because the intended parents gain much more than the surrogate.’¹⁰⁷ The third account is moralistic exploitation, whereby the intended parents benefit from a transaction that is immoral, ‘perhaps because the relationship involves an exchange of radically incommensurate values, or

¹⁰¹ Interview 02IM, recorded on 09/07/16 (on file with the author).

¹⁰² A Wertheimer, *op cit*, n7, p212.

¹⁰³ *Ibid*, p213.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*, p214.

because the transaction wrongly commodifies procreational labor'.¹⁰⁸ This is the definition of exploitation used by *The Warnock Committee* to object to surrogacy.¹⁰⁹

Turning to the 'dimension of choice', Wertheimer suggests that the voluntariness of the surrogate's decision may be compromised by coercion or her inability to fully appreciate what she is committing herself to doing.¹¹⁰ Where coercion is an issue, we must question whether the consent was sufficiently free, and where the surrogate is unable to fully appreciate the surrogacy arrangement we must question whether the consent was sufficiently informed or rational.¹¹¹ This section explores the judgment delivered in '*Re Z (Surrogacy agreements)*'¹¹² to consider whether exploitation, and which type, can arise within UK DIY arrangements.

(I) '*Re Z (surrogacy agreements)*': Exploitation in the UK Surrogacy Context?

'*Re Z (surrogacy agreements)*' is a startling example of how the absence of proper regulation and a non-profit surrogacy organisation can result in vulnerable women being used as surrogates in DIY arrangements. The case, heard by Russell J, concerned an application for a child arrangements order, which was made in respect of a baby boy born in England in the summer of 2015, as a result of gestational surrogacy.¹¹³ The intended parents, A and B were a same sex couple, and already had twins who had been born to a surrogate, V.¹¹⁴ Shortly after obtaining the parental orders in respect of the twins, the couple entered into a second surrogacy arrangement with X who was

¹⁰⁸ *Ibid.*

¹⁰⁹ *Op cit*, n97 at 8.17, 'The moral and social objections to surrogacy have weighed heavily with us.'

¹¹⁰ A Wertheimer, *op cit*, n7, p224.

¹¹¹ *Ibid*, p224. For criticisms of A Wertheimer's theory, or for alternative definitions of exploitation see, Lynn A. Jansen and Steven Wall, 'Rethinking Exploitation: A Process-Centred Account', *Kennedy Institute of Ethics Journal*, Volume 23, Number 4, December 2013, pp. 381-410 (Article); H Liberto, 'Exploitation and the Vulnerability Clause', *Ethic Theory Moral Prac* (2014) 17:619-629; and S Wilkinson, 'The Exploitation Argument Against Commercial Surrogacy', *Bioethics* ISSN 0269-9702 Volume 17 Number 2 2003.

¹¹² *Op cit*, n1.

¹¹³ [1] (Russell J).

¹¹⁴ [9] (Russell J).

a young mother in her early twenties, with learning difficulties and a low-income.¹¹⁵ The intended parents were introduced to X through a Facebook surrogacy site, ‘which was run or administered to provide a forum for the introduction of potential surrogates and commissioning parents’.¹¹⁶ There is no screening of either surrogates or intended parents and no support available other than support from others involved with the forum.¹¹⁷

Some months before the child was born, the surrogate expressed her intention that she would refuse to consent to the making of a parental order, as required by section 54 HFEA 2008. By the time that Z was born, the surrogate had suffered a miscarriage of one of the babies she was carrying and had hidden the fact that one foetus had survived from the applicants.¹¹⁸ The intended parents only found out Z was carried to full term just prior to his birth.¹¹⁹ The applicants launched legal proceedings in an attempt to get the surrogate to hand the baby over to them. The applicants claimed that ‘she had behaved in a deceitful and calculating manner and that it was not in Z’s best interests to remain living with her, her partner and their son’.¹²⁰ The child, Z, was not the surrogate’s genetic or biological child (being the biological offspring of A and an egg donor) but under section 33 HFEA 2008, the surrogate was Z’s legal mother. Russell J accepted the guardian’s recommendations that Z should live with his gestational mother, X, and spend time with A and B for one in every 8 weekends until he reached the age of two.¹²¹ The guardian found that Z’s primary attachment was to the surrogate and she was better able to meet all his needs, emotionally as well as physically.¹²² By contrast, A – Z’s biological parent – ‘visibly struggled to acknowledge her [the surrogate] as Z’s mother’.¹²³

¹¹⁵ [45] (Russell J).

¹¹⁶ [2] (Russell J).

¹¹⁷ [2] (Russell J).

¹¹⁸ [3] (Russell J).

¹¹⁹ [3] (Russell J).

¹²⁰ [3] (Russell J).

¹²¹ [123] (Russell J).

¹²² [110] (Russell J).

¹²³ [105] (Russell J).

Using Wertheimer's accounts of exploitation, it is suggested that the intended parents exploited X, the surrogate, by taking unfair advantage of her. In terms of the dimension of value, the surrogate stood to benefit from the transaction (at least financially), the intended parents were to receive something in return (a child and sibling for their twins), but the agreement was both harmful and unfair to the surrogate. Secondly, the surrogate's choice was compromised because she was unable to fully appreciate the arrangement and what was involved.¹²⁴ It is suggested that out of Wertheimer's three types of exploitation ('harmful', 'mutually-advantageous' and 'morally harmful'), this case was an instance of 'harmful' exploitation ; the intended parents stood to gain enormously by the surrogacy, whereas the surrogate was without doubt harmed by the arrangement.

(II) Taking Advantage of the Surrogate's Vulnerabilities: Defect of Choice?

As Wertheimer suggests, 'the voluntariness of the surrogate's decision may be compromised by coercion or by her inability to fully appreciate just what she is committing herself to doing'.¹²⁵ Where the latter arises, he states that we must 'question whether the consent was sufficiently informed or rational.'¹²⁶ The surrogate in *Re Z (Surrogacy agreements)* did not fully understand the agreement and therefore did not provide informed consent. Russell J considered that it was 'questionable whether she had a full understanding of the process at any stage' of the surrogacy process¹²⁷ and that it was clear that X, the surrogate, 'could not read or understand the contract she had signed'.¹²⁸ The surrogate's defect in choice can also be inferred from the Clinical Psychologist's report and cognitive assessment of X, completed in November 2015. The psychologist, Dr Willemsen, determined that X had 'severe

¹²⁴ [7] (Russell J).

¹²⁵ A Wertheimer, *op cit*, n7, p224.

¹²⁶ *Ibid.*

¹²⁷ [7].

¹²⁸ [52] (Russell J).

learning difficulties’, ‘difficulties communicating and ... [that] her written and verbal comprehension and communication abilities were low’.¹²⁹ He confirmed that X has:

‘Learning difficulties of “a likely congenital nature” and suffers from low self-esteem and that the combination of her environment and her learning difficulties render her a vulnerable young woman.’¹³⁰

Until Dr Willemsen saw X, neither her family nor her partner were aware of the difficulties, although she was ‘perceived as different from her siblings and her peers at school, and her partner told me [Dr Willemsen] that while he was aware she was vulnerable he did not know just how vulnerable’.¹³¹ X was described as wanting to please people and had trouble speaking up.¹³² She was described by Dr Willemsen as ‘a vulnerable young woman who is susceptible to influence and pressure from others.’¹³³

X signed an agreement based on a template – found online – that mirrored commercial surrogacy arrangements in the USA. She signed this at a fast-food outlet near a railway station ‘after a brief face to face meeting lasting less than two hours’.¹³⁴ The surrogate was accompanied by her young son and a young relative.¹³⁵ This meant the intended parents and surrogate did not spend time getting to know one another and rushed straight into an agreement. Moreover, the intended parents were unconcerned about protection for X’s position and ‘never even bothered to send her a signed copy’.¹³⁶ Wertheimer suggests that if the defect in the surrogate’s choice arises ‘not due to a lack of “external information” or opportunity for deliberation, but is the result of her own cognitive and emotional limitations’, this ‘might’ be exploitation. This thesis goes

¹²⁹ [25].

¹³⁰ [25].

¹³¹ [46].

¹³² [46].

¹³³ [46].

¹³⁴ [11] (Russell J).

¹³⁵ A and B had previously entered into a surrogacy arrangement with ‘V’ over Facebook, and the parties subsequently signed an agreement at a brief meeting in a Motorway services station.

¹³⁶ [52] (Russell J).

further: where a defect of choice has arisen at all, the defect should be enough to constitute exploitation.

Following the agreement entered near the railway station, there were no further face to face meetings until X flew to Cyprus with one of the intended parents, A, ‘a man she had met once in a fast-food outlet in a strange town’.¹³⁷ Russell J stated:

‘It does not take much imagination to consider how this vulnerable young woman must have felt in a room in a clinic attended only by strangers while the “treatment” took place and the embryo was placed inside her.’¹³⁸

The trip was unpleasant for the surrogate and she was ‘effectively excluded from discussions at the clinic; certainly she did not, on anyone’s account, actively participate in any conversation with the consultant in the clinic’.¹³⁹ She felt more isolated because she did not have credit on her phone and Russell J found it ‘incomprehensible’ that A had not seen to it that X was able to contact her family.¹⁴⁰ Moreover, X ‘felt deeply uncomfortable about the arrangement but she could not find a way of expressing her feelings because she was concerned that she might upset and displease the couple.’¹⁴¹ She did not want the surrogacy to continue but did not have the capacity to communicate her wishes. Russell J empathised that ‘she must have felt very alone at times’.¹⁴²

On the surrogate’s vulnerability, Russell J commented how it was striking that the applicants ‘did not seem able to see how vulnerable X was even at this stage’.¹⁴³ She observed that the ‘guardian was almost immediately struck by it’ and ‘even on their first phone call she [the guardian] sensed that X was lacking in confidence and that by

¹³⁷ [62] (Russell J).

¹³⁸ [62] (Russell J).

¹³⁹ [65] (Russell J).

¹⁴⁰ [65] (Russell J).

¹⁴¹ [65] (Russell J).

¹⁴² [65] (Russell J).

¹⁴³ [71] (Russell J).

the time she had met X and spoken to her she believed she had learning difficulties'.¹⁴⁴ Everyone with whom the guardian spoke:

‘commented on her vulnerability: they included the mid-wife; P’s mother who described X as ‘naïve and gullible’; P, himself, spoke about “how vulnerable [X] is”; X’s step-father described her as “gullible”; her own sister described X as “very naïve”; a family friend described X as lacking confidence.’¹⁴⁵

There is a clear sense that the intended parents recognised the surrogate was vulnerable and played on her vulnerabilities for their own gain. As Wertheimer states, this worsens the exploitation because the intended parents manipulated the surrogate’s capacity as a rational agent to their advantage.

(III) Harmful Exploitation and Risks to the Surrogate’s Health

In addition to the surrogate’s defect in choice, the arrangement was harmful, thus requiring a discussion of Wertheimer’s ‘dimension of value’ and harmful exploitation definition. The agreement is, ‘on an all things considered approach’, harmful and unfair to the surrogate who had to undertake risks to her health and forgo her own procreative liberty. Firstly, the applicants had not arranged life insurance as agreed despite the agreement stipulating that it would be arranged before the pregnancy. X became so worried about this, she messaged A: ‘I would like to get insurance starting today please, as it should have been done befor we [sic] got pregnant xx’.¹⁴⁶ Moreover, the procedure in Cyprus was also risky for the surrogate. X had never wanted to carry two embryos but ‘did not say anything to the applicants as she did not want to let them down’.¹⁴⁷ X was ‘both scared and anxious’¹⁴⁸ about carrying two embryos but believed the applicants when they told her that ‘probably only one would work’.¹⁴⁹ She was also excluded from conversations in the clinic, despite the discussions being about her body and the embryos she was carrying. It is argued that

¹⁴⁴ [71] (Russell J).

¹⁴⁵ [71] (Russell J).

¹⁴⁶ [67].

¹⁴⁷ [66] (Russell J).

¹⁴⁸ [66] (Russell J).

¹⁴⁹ [66] (Russell J).

X's right to make reproductive decisions was violated. According to the 1994 International Conference on Population and Development in Cairo (ICPD), reproductive rights:

‘... rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so ... It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents...’.¹⁵⁰

X, the surrogate, could not decide freely, and without coercion, how many embryos she wanted to carry. X was clearly under pressure and did not want to displease the intended parents, thus invalidating her consent.

Multiple embryo transfers are usually associated with international commercial surrogacy.¹⁵¹ Mohapatra submits that ‘most surrogacy clinics in Ukraine and India implant the surrogates with multiple embryos to boost their success rate’.¹⁵² Pregnancy with multiple embryos ‘exposes surrogates to increased risks, such as “hypertension, gestational diabetes, and excessive bleeding in labor and delivery.”’¹⁵³ The case of *Re Z (Surrogacy agreements)*¹⁵⁴ highlights how surrogates involved in DIY arrangements in the UK are subject to the same health risks as surrogates in the Ukraine and India where multiple embryo transfers are a common feature. The surrogate in *Re Z (Surrogacy agreements)* was not even involved in the discussions in the Cyprus clinic,¹⁵⁵ which suggests she was not informed of the risks with implanting multiple embryos.

¹⁵⁰ ICPD Programme of Action 1994, adopted at the International Conference on Population and Development Cairo, 5–13 September 1994, para 7.3. 20th Anniversary Edition available at, <https://www.unfpa.org/sites/default/files/pub-pdf/programme_of_action_Web%20ENGLISH.pdf> (last accessed 04/06/18)

¹⁵¹ S Saravanan, *op cit*, n4, p8.

¹⁵² S Mohapatra, ‘Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy’, 30 *Berkeley Journal of International Law*, 412 (2012). P442.

¹⁵³ *Ibid*, p442.

¹⁵⁴ *Op cit*, n1.

¹⁵⁵ [65] (Russell J).

Once back in the UK, and when blood tests confirmed the pregnancy, A and B started to pay X £500 a month.¹⁵⁶ The total amount was agreed to be £9,000 and the applicants had agreed a sum of just £1,000 in the event of a hysterectomy; they said they ‘absolutely’ could not afford a larger sum.¹⁵⁷ This kind of clause is completely unethical because ‘this event, had it occurred, would have meant that X could never have any more children’.¹⁵⁸ The surrogate, X, was only in her early twenties so if a hysterectomy was needed at such a young age, this would have had a significant impact on her reproductive rights and health. This is a clear example of ‘harmful exploitation’ because the benefits to the surrogate (if there were any) are outweighed by the risk to her health. Lauren, the intended mother who had a child through surrogacy with the support of SUK, referred to *Re Z (Surrogacy agreements)* during her interview and said that this type of situation ‘would have been flagged up at SUK immediately.’¹⁵⁹

It is worth noting that the intended parents’ exploitation of the surrogate in ‘*Re Z (Surrogacy Agreements)*’ is contrary to the best interests of the child. The surrogate is an important person in the child’s life.¹⁶⁰ Although it is argued that the surrogate should not be recognised as the child’s legal mother¹⁶¹ her contribution still deserves respect. The surrogate donates the use of her body and time; without her, the child could not have been born. It is not in the child’s life-long welfare to be raised by intended parents who exploit their gestational parent. For example, if the intended parents in ‘*Re Z (Surrogacy Agreements)*’ had been granted a child arrangements order, and the child subsequently learnt of the intended parents ‘crass’ behaviour towards the surrogate when she was in Cyprus,¹⁶² he / she may feel guilty or begin to resent their intended parents.

¹⁵⁶ [12].

¹⁵⁷ [12] (Russell J).

¹⁵⁸ [12] (Russell J).

¹⁵⁹ Interview 03IM, recorded on 11/07/16 (on file with the author).

¹⁶⁰ *Re G* [2006] UKHL 43, [34] (Baroness Hale).

¹⁶¹ Section 33 HFEA 2008 accords legal motherhood to the surrogate ‘and no other woman’. For criticism of this provision, see chapter 5.

¹⁶² Russell J stated that the intended parent’s behaviour towards the surrogate ‘was crass; they did not know that she had never been abroad before because they didn’t ask. They took no steps to

The risk of surrogate exploitation within the DIY context is clear. Although less discussed and less obvious, there is a risk of exploitation for intended parents, too.¹⁶³ This exploitation appears to be exacerbated by the current legal framework, which does not encourage parties to use a non-profit organisation. In light of the deficiencies with current regulation, which does nothing to prevent intended parents entering DIY arrangements, the final part of this chapter considers whether non-profit surrogacy organisations should be used to discourage informal arrangements, and whether the HFE Authority has any role to play in this context.

6.4 Discouraging DIY Arrangements: Should the Human Fertilisation and Embryology Authority License Non-Profit Surrogacy Organisations?

The interviews carried out for this project indicate that non-profit organisations, including COTS and SUK, provide a more supportive and professional basis for parties entering surrogacy arrangements. The inhumane treatment of the surrogate in *Re Z (Surrogacy agreements)* shows that DIY arrangements inadequately support the surrogate. As such, ‘DIY’ arrangements should be discouraged in the UK. In order to achieve this, it is suggested that non-profit surrogacy organisations should be licensed, in the same way clinics providing IVF treatment are licensed by the Human Fertilisation and Embryology Authority.

(I) Licensing Non-Profit Organisations: What are the Advantages for Intended Parents, Surrogates and Children?

It is suggested that UK surrogacy arrangements should be arranged and facilitated by a non-profit organisation (e.g. COTS, SUK, or Brilliant Beginnings), and the non-profit organisation should be licensed in a similar way to clinics providing IVF treatment. In 1984, the minority of *The Warnock Committee* argued:

ensure that she was comfortable or to find out from her what they could do to make her feel supported, and, above all appreciated’, [63].

¹⁶³ *Op cit*, n32.

‘Whatever we as an Inquiry may recommend, the demand for surrogacy in one form or another will continue, and possibly even grow ... As a consequence couples may give up any hope of a child, may take further risks such as of more miscarriages, or may decide to venture into some sort of “do-it-yourself” arrangement. The latter possibility – that couples are driven into making their own arrangements – is particularly unsatisfactory. These arrangements would be unsupported by medical and counselling services...’.¹⁶⁴

One only has to look at the case of *Re Z (Surrogacy agreements)* to see the exploitative effects of not having any professional services involved in a surrogacy arrangement. The minority suggested that the licensing authority proposed by *The Warnock Committee* (now known as the Human Fertilisation and Embryology Authority) should include the regulation of surrogacy within its terms of reference.¹⁶⁵ The minority also believed the authority should be empowered to license non-profit making agencies who could match the intended parents with the surrogate, and provide ‘adequate counselling to ensure that the legal and personal complications of surrogacy were fully understood.’¹⁶⁶ The minority envisaged that only agencies without commercial motive, and with experience of child-care issues would be licensed.¹⁶⁷ They also suggested that access to a surrogacy agency should only be by referral from a gynaecologist.¹⁶⁸ This recommendation is rejected given that surrogacy is not just a way to overcome fertility, but something used by single parents, same-sex couples and doubly-infertile¹⁶⁹ couples to have a family.

In 1998, *The Brazier Review* observed that in a subsequent White Paper, *Human Fertilisation and Embryology: A Framework for Legislation* (Cm. 259) the Government rejected Greengross and Davies’ proposal to license non-profit making surrogacy agencies and to bring surrogacy arrangements within the jurisdiction of the

¹⁶⁴ ‘*The Warnock Report*’, *op cit*, n97. Greengross and Davies (minority dissent) p88, para 4.

¹⁶⁵ *Ibid*, para 5.

¹⁶⁶ *Ibid*.

¹⁶⁷ *Ibid*.

¹⁶⁸ *Ibid*.

¹⁶⁹ See chapters 4 and 5.

HFE Authority.¹⁷⁰ Moreover, although the White Paper proposed that the HFE Authority review surrogacy ‘from time to time and report to Parliament’¹⁷¹ and that regulation should permit the Secretary of State to extend the HFE Authority’s powers to include a power to license non-profit making surrogacy agencies, ‘these proposals did not find their way into what became the 1990 Act and so no express obligations were placed on the HFEA’.¹⁷²

At the time of The *Brazier Review*, COTS would have liked ‘to be “licensed” to assist in surrogacy arrangements’.¹⁷³ COTS was concerned about underground surrogacy, and worried that many arrangements are made without any advice or support, or on the basis of advice from individuals or organisations of questionable integrity.¹⁷⁴ These concerns have materialised. The *Brazier Review* suggested there were two options for extending the role of the HFE Authority, to surrogacy arrangements. The first option would be to require that all authorised surrogacy had to take place in a licensed fertility clinic. The *Brazier Review* rejected this option because it was concerned that, ‘although infertility is clearly a reason for seeking surrogacy, we do not believe that surrogacy arrangements are correctly perceived as merely another treatment for infertile people’.¹⁷⁵ It continued:

‘The involvement of the surrogate mother requires a consideration of other factors, much more akin to the dilemmas of adoption than those of infertility, both from the point of view of her welfare and of the child’s welfare. We do not believe, therefore, that fertility clinics are necessarily the correct setting for negotiating surrogacy arrangements, though we accept that they have an important part to play, especially in IVF surrogacy.’¹⁷⁶

¹⁷⁰ Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, Cm 4068 (1998), para 2.23. Hereafter ‘*The Brazier Review*’. At 2.25.

¹⁷¹ *Ibid.*, 2.26.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, 3.34.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*, 6.13.

¹⁷⁶ *Ibid.*

Although a fertility clinic is not necessarily the correct setting for negotiating a surrogacy arrangement, a non-profit organisation like COTS or SUK already has an effective approach, which could be used in a regulatory scheme.

The *Brazier Review* considered the alternative possibility that surrogacy could continue both in licensed fertility clinics but also under the auspices of non-medical bodies like COTS.¹⁷⁷ The HFE Authority would be required to license both types of agency. The *Brazier Review* concluded that regulating non-profit surrogacy organisations was not an appropriate role for the HFE Authority. The *Brazier Review*'s proposals were supported by the HFE Authority:

‘The HFEA regulates the medical treatments required by the surrogate mother in order to become pregnant in a surrogacy arrangement. The nature of the regulation required for surrogacy agencies is outside the HFEA’s remit and area of expertise ... [T]he role of surrogacy agencies is to match up surrogate mothers with commissioning couples and to support the surrogacy arrangement after pregnancy has been achieved which can include the subsequent registration of birth, adoption or the obtaining of a parental order for the child. The body regulating surrogacy agencies would need to have knowledge and expertise in those areas, and not the medical and scientific expertise covered by the HFEA.’¹⁷⁸

Although the HFE Authority is responsible for regulating the medical treatments required by the surrogate in order to become pregnant (e.g. IVF or embryo transfers), it is still possible for the HFEA to extend its remit to the non-medical aspects of surrogacy. The Authority could set up a sub-committee with experts on surrogacy, who would have the knowledge to license and regulate non-profit organisations like COTS and SUK. Brazier was of the view that ‘any attempt to extend the remit of the HFEA (for example, by setting up a special subcommittee with the range of expertise required) would fail to reflect the unique nature of surrogacy arrangements’.¹⁷⁹ However, setting up a special subcommittee would better reflect the unique nature of

¹⁷⁷ *Ibid*, 6.11.

¹⁷⁸ *Ibid*, 6.18.

¹⁷⁹ *Ibid*, 6.19.

surrogacy arrangements and allow licensed non-profit organisations to facilitate surrogacy agreements, thus deterring intended parents from resorting to DIY arrangements. The fact that surrogacy does not fit neatly into the HFE Authority's expertise is all the more reason for it to be regulated, otherwise surrogacy agreements will continue to be made within a regulatory vacuum and cases like *Re Z* may reoccur.

Regulating and licensing non-profit surrogacy organisations would add a layer of protection for those using these agencies and drive up standards within non-profit organisations. As the HFE Authority says on its website:

‘Regulation is important because it ensures that the work carried out is to a certain standard; that only qualified people can do it; and that research on embryos is only done where there is a real need and in a way that’s ethical.’¹⁸⁰

The non-profit surrogacy organisation would also need to apply for a licence to carry out their work. A licence can be granted by the HFE Authority for up to four years, with new clinics receiving a two-year licence. Before granting a new licence, or renewing an existing one, the sub-committee responsible for surrogacy could conduct an inspection to make sure the non-profit organisation's services are up to standard. Like fertility clinic inspections, the sub-committee could present the findings to the Authority's Licence Committee, which decides whether to grant or refuse a licence, ‘or, if they feel the quality of service needs to be better, put conditions on the licence which ensure it only remains in place if improvements are made’.¹⁸¹

It is important to note that non-profit surrogacy agencies are imperfect, and the conditions for a licence could help improve existing agencies and ensure that those facilitating the surrogacy arrangement have the expertise to advise intended parents and surrogates. In *Re G (Surrogacy: Foreign Domicile)*,¹⁸² COTs made some serious errors when advising intended parents about the parental order requirements. The COTS membership form had specific rates for couples who lived abroad,¹⁸³ despite

¹⁸⁰ See the HFE Authority's website, <https://www.hfea.gov.uk/about-us/how-we-regulate/> (last accessed 13/06/18).

¹⁸¹ *Ibid.*

¹⁸² *Op cit*, n91.

¹⁸³ [22] (McFarlane J).

section 30(3)(b) HFEA 1990 making it clear that one, or both, of the intended parents must be domiciled in a part of the UK, or in the Channel Islands or the Isle of Man. Mr and Mrs G, the intended parents, were Turkish nationals domiciled in Turkey. COTS had believed that ‘parents in the position of Mr and Mrs G would qualify for a parental order and could simply take a baby born through surrogacy back to Turkey without any difficulty’.¹⁸⁴ COTS overlooked the crucial fact that foreign intended parents, like Mr and Mrs G, by reason of their domicile, are unable to achieve the status of legal parents by means of a parental order.¹⁸⁵ McFarlane J stated:

‘I readily accept that COTS is a well intentioned voluntary organisation whose aim is to assist couples through surrogacy... That being said, COTS must at least shoulder part of the responsibility for the very unsatisfactory outcome (in legal terms) that they assisted in creating.’¹⁸⁶

McFarlane J suggested that agencies involved in facilitating surrogacy arrangements, whether ‘statutory or run by well motivated volunteers, must ensure that they are fully familiar with the basic requirements of the area of the law within which these arrangements are made.’¹⁸⁷ The situation is wholly inadequate for the resulting child who was left without a parental order.¹⁸⁸ Part of the conditions for a licence could be to ensure volunteers and others working in the non-profit organisation are familiar with the requirements in the HFEA 2008 (including the parental order requirements in section 54), the law according to the SA Act 1985, and crucially the Parental Order Regulations 2010 which determine that the child’s life-long welfare is to be the ‘paramount concern’.

(II) The Compliance Problem: Creating Incentives for Intended Parents to Choose the Licensed Route

¹⁸⁴ [19] (McFarlane J).

¹⁸⁵ [3] (McFarlane J).

¹⁸⁶ [23] (McFarlane J).

¹⁸⁷ [52] (McFarlane J).

¹⁸⁸ In *Re X (A Child: Surrogacy Time Limit)* [2014] EWHC 3135 (Fam), Munby P stated that a parental order provides the child with the ‘optimum legal and psychological solution’, [7].

Part of creating this new system of regulation would depend upon surrogates and intended parents choosing to use a non-profit organisation, rather than the DIY route. Jackson suggests that ‘if there is a widespread lack of understanding about the benefits of regulation, a two-pronged strategy may be necessary’.¹⁸⁹ Firstly, it is important for the regulator (in this context the HFE Authority and the proposed surrogacy sub-committee) to ‘broaden the scope of its public education function’.¹⁹⁰ She suggests that it is not only important to have advice about the risks of opting out from regulation but also ‘more positively, a clear and accessible explanation of what the benefits of regulation are, for patients and for children.’¹⁹¹ In the context of surrogacy, the benefits of using a licensed surrogacy agency for the surrogate, intended parent(s) and resulting child should be explained.

In addition to persuading intended parents and surrogates of the advantages of regulated and licensed non-profit surrogacy agencies, ‘there may be circumstances in which it would be appropriate to provide incentives to seeking regulated treatment services’.¹⁹² Jackson suggests that:

‘Certainly in relation to surrogacy, any attempt to introduce a system in which surrogate mothers and commissioning parents went through a formal approval process before embarking on a surrogate pregnancy would have to be accompanied by some sort of advantage to doing so, otherwise few people would be willing to submit themselves to a potentially intrusive process which would have no possible benefits for them.’¹⁹³

It was argued in the previous chapter, that there should be a presumption of legal parenthood in respect of the child’s intended parents. Intended parents who go through the licensed route could have their parental order pre-authorised. The date the parental

¹⁸⁹ E Jackson (2015) The law and DIY assisted conception. In: Horsey, Kirsty, (ed.) *Revisiting the Regulation of Human Fertilisation and Embryology*. Biomedical law and ethics library. Routledge, Abingdon, UK, pp. 31-49. ISBN 9781138021891. Accessed at <http://eprints.lse.ac.uk/64232/> (16/09/18), p17.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

order would take effect could be the day the child is born. Pre-birth orders are advocated by the Surrogacy Working Group which suggests that where the parental order requirements are met, 'parental orders should be pre-authorised so that where arrangements run smoothly, legal parenthood is conferred on the IPs at birth.'¹⁹⁴ It is suggested that this should be allowed where the surrogacy is entered with a licensed non-profit surrogacy organisation.

The decision to award a parental order must be guided by the child's welfare and best interests, so there would be difficulty making this assessment before the child is born. Nevertheless, CAFCASS could be involved during the pregnancy to check how the intended parents have prepared for the child's birth. The CAFCASS officer could still undertake a child welfare assessment after the child is born, and where welfare concerns are raised the court would then have to revisit the parental order and decide where, and with whom, the child should live. This process would take place where the parties use a licensed non-profit surrogacy agency. As Jackson says, 'perhaps some would-be parents might be persuaded that going through an official pre-approval procedure could make their lives easier in the long run.'¹⁹⁵

It is recalled from the previous chapter, that the uncertainty felt by intended parents while waiting for the parental order hearing is a problem. Sophie, a mother who entered into a surrogacy arrangement using COTS, explained that the surrogacy process would be better if intended parents could make a pre-birth order akin to divorce 'when you have the *decree nisi* and the *decree absolute*, a provisional version during the pregnancy and then confirmed on birth and for that process to be very quick'.¹⁹⁶ She explained that 'it feels very insecure not to have that for however many months it take for the parental order to be resolved'.¹⁹⁷ Lauren, the intended mother who entered into a surrogacy agreement using SUK, also explained how difficult it

¹⁹⁴ 'Surrogacy in the UK: Myth busting and reform', *Report of the Surrogacy UK Working Group on Surrogacy Law Reform*, November 2015, p38. Available at <https://kar.kent.ac.uk/59740/1/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> (last accessed 16/09/18).

¹⁹⁵ E Jackson, *op cit*, n189, p17.

¹⁹⁶ Interview 02IM (on file with the author).

¹⁹⁷ *Ibid.*

was not having the parental order finalised until 15 months after her children were born.¹⁹⁸ Approving the parental order before birth (which would take effect on the day the child is born) might provide a real incentive for intended parents to use licensed non-profit surrogacy agencies, rather than risking DIY and international commercial surrogacy agreements. This would reduce the uncertainty intended parents currently feel about the parental order process. Beside avoiding the legal problems seen in *Re Z*, encouraging intended parents to use a non-profit facilitator would help to generate positive relationships with the surrogate, which can help promote the child's best interests.¹⁹⁹ The empirical work shows that a pre-birth order is something intended parents would like to be introduced to the regulation, and the proposal is also supported by the SUK working group.

6.5 Conclusion

This chapter has identified and explored the problems with DIY surrogacy arrangements entered through informal platforms in the UK. The problems arising from these arrangements, include the exploitation of surrogates and the frustrated intentions of intended parents whose desire to have a child through surrogacy is thwarted when relationships between the parties deteriorate. Two types of informal DIY arrangements were discussed: (1) arrangements entered between friends, and (2) arrangements entered between strangers through online platforms like 'Facebook'. Interviews with three mothers, Sophie, Rosie and Lauren, were used to understand the processes involved with COTS and SUK. Their accounts were compared with the case law and experiences of Bea who entered into a surrogacy agreement using a secret 'Facebook' group.

The comparative exercise indicates that surrogacy arrangements entered into with the help of a non-profit surrogacy organisation are more supportive and structured. Sophie described herself as being 'so lucky with our surrogate'.²⁰⁰ She chose COTS because

¹⁹⁸ Interview 07IM, recorded on 15/07/16 (on file with the author).

¹⁹⁹ If the surrogate and intended parents have a positive relationship, the surrogate is less likely to object to the parental order being made or delaying that process (as was the case with Bea and her surrogate).

²⁰⁰ Interview 02IM, recorded on 09/07/16 (on file with the author).

the organisation allowed intended parents to write a profile, which is sent out to available surrogates. She liked this means of introduction and felt able to ‘write my story well’.²⁰¹ Lauren reported having a very special bond with her surrogate and this was developed with the help of the ‘friendship first’ ethos promoted by SUK. When Lauren met her surrogate at a SUK social event she felt ‘instantly connected and knew there was something very special in the relationship’.²⁰² The organisation helped to develop this friendship through a getting-to-know period, which allowed the parties to ‘invest in a genuine bond’.²⁰³ By contrast, arrangements entered into via the internet are risky and problematic for intended parents like Bea, who was left without support when her relationship with the surrogate deteriorated during the pregnancy.

This chapter also explored whether DIY surrogacy arrangements can exploit UK surrogates. Although exploitation was a concern of the *Warnock Report* of 1984, it has been assumed that the issue was resolved after the SA Act 1985 prohibited commercial surrogacy, including payments to surrogates, profit-making agencies, enforceable contracts and advertising. Therefore, exploitation is now associated with surrogates used in international commercial surrogacy arrangements, particularly those from poorer socio-economic countries like India. Using Wertheimer’s account of exploitation to analyse the recent judgment, *Re Z (Surrogacy Agreements)*, it became clear that exploitation is an emerging issue in the UK. The genuine bond and friendship-first ethos practised by SUK was completely absent from the DIY context in *Re Z*. Instead, the surrogate, X, was treated as a means to an end and signed the agreement at a fast-food outlet near a railway station ‘after a brief face to face meeting lasting less than two hours’.²⁰⁴ As Russell J observed, ‘the applicants’ sole focus was on signing an agreement. There was little, if any, evidence in their messages of interest in X herself...’.²⁰⁵

Change to the current regulatory system is urgently required to dissuade intended parents and surrogates, from choosing the DIY route. The pull towards informal

²⁰¹ *Ibid.*

²⁰² Interview 07IM, recorded on 15/07/16 (on file with the author).

²⁰³ *Ibid.*

²⁰⁴ [11] (Russell J).

²⁰⁵ [52] (Russell J).

arrangements is a strong one for intended parents, many of whom have spent years trying to have children. As Bea explained during her interview, ‘You’d bite anyone’s hand off that offered because you’re desperate and there aren’t enough people willing to do it.’²⁰⁶ It is proposed that the HFE Authority (or a sub-committee) should be responsible for licensing and regulating non-profit surrogacy organisations. This would ensure that the standards within those organisations are to a high quality. The HFE Authority could increase its education function by providing better information to intended parents and surrogates about the advantages of choosing a licensed non-profit surrogacy organisation. Incentives could also be provided by the HFE Authority for intended parents to choose a regulated organisation. Intended parents using a licensed organisation would have the parental order pre-approved before the child’s birth and this would take effect on the date the child is born.²⁰⁷ This two-pronged approach, advocated by Jackson,²⁰⁸ could help to dissuade intended parents from entering risky and problematic DIY arrangements, thus reducing the incidence of exploitation and frustrated reproductive goals.

Further research is now needed to ascertain whether it is feasible for the HFE Authority to license and regulate non-profit surrogacy organisations, and whether its position has changed since the *Brazier Review*, at which point it felt that surrogacy should not be within its remit.²⁰⁹ Moreover, the non-profit surrogacy organisations must also be consulted to see whether they are persuaded by the idea of being regulated by the HFE Authority. If the HFE Authority is still deemed an inappropriate body to regulate surrogacy, then policy-makers must make steps to appoint a body responsible for overseeing non-profit surrogacy organisations and help reduce DIY arrangements in the UK.

²⁰⁶ Interview 01IM, recorded on 15/07/18 (on file with the author).

²⁰⁷ Since exploitation can arise within the family context, it is suggested that there needs to be more debate about whether family members should be allowed a pre-birth order automatically, or whether family members should also have to go through a licensed non-profit organisation to receive this benefit.

²⁰⁸ E Jackson, *op cit*, n189.

²⁰⁹ *The Brazier Review*, *op cit*, n170, at 6.18.

7. Exploring the Causes and Problems of Cross-Border Reproduction: How Should UK Regulation Respond to International Commercial Surrogacy Arrangements?

7.1 Introduction

UK surrogacy regulation operates on two levels: (1) domestic, and (2) international. This chapter examines the problems arising from international commercial surrogacy arrangements and considers how UK regulation should respond to this growing phenomenon. As Jackson *et al.*, observe, ‘people travel to receive fertility services for a broad range of ‘push’ and ‘pull’ reasons.¹ Some travel to receive procedures that are illegal or unavailable to them at home; others are in search of better care, shorter waiting times, greater privacy or lower costs.’² Doctrinal analyses of the cases and interviews carried out with two intended parents, who had children after entering international commercial surrogacy arrangements, are used throughout the chapter to: (1) illuminate the ‘push’ and ‘pull’ factors influencing the decision to use cross-border surrogacy arrangements and, (2) the problems that ensue from these types of arrangements for both the intended parents and children involved. Commercial surrogacy involves payment to the surrogate, profit-making agencies such as fertility clinics and surrogacy brokers, advertising, and enforceable arrangements.

This chapter begins by considering whether the ban on commercialisation, particularly the prohibition on payments to surrogates,³ which has existed in the UK since the Surrogacy Arrangements Act 1985 (SA Act 1985), is responsible for driving intended

¹ E Jackson, J Millbank, I Karpin and A Stuhmcke, ‘Learning from Cross-Border Reproduction’ *Medical Law Review*, 2017, Vol. 25, No. 1, pp23–46. PP 23-24.

² *Ibid*, p24.

³Section 54(8) Human Fertilisation and Embryology Act 2008 limits payment to ‘reasonable expenses’.

parents overseas. The first part looks at the factors influencing the SA Act 1985's prohibition of commercial surrogacy, including the '*Baby Cotton*' case⁴ and the *Warnock Report*⁵ which was concerned with the 'risk of commercial exploitation of surrogacy'.⁶ It is considered whether the purpose of the legislation, to prevent the exploitation of women, has been effective. In the second part of the chapter, a combination of doctrinal analysis and empirical analysis from the interviews with two intended parents – Liz and Steve – are used to assess the practical and legal problems arising from international commercial surrogacy arrangements and the implications for the intended parents' procreative liberty. Specifically, the 'obvious difficulties of inconvenience, delay, hardship and expense'⁷ and problematic conflict of laws, which can result in the intended parents being separated from their child, are examined. The reasonable expenses conundrum,⁸ which maintains that surrogates can only be paid 'reasonable expenses' in the UK, is also grappled with and the tensions between child welfare and public policy objections to commercial surrogacy are discussed by drawing on the case law.⁹ It is contemplated whether the 'ban' on commercial surrogacy is sustainable, given that commercial payments exceeding 'reasonable expenses' have been authorised by the judiciary in a plethora of international surrogacy cases.¹⁰ These payments have in part benefited the surrogate involved, but it is usually the commercial agencies, surrogacy brokers and fertility clinics who make the most profit, despite the surrogate doing the hard work.¹¹

⁴ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846. Hereafter '*Baby Cotton*'.

⁵ M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter, '*The Warnock Report*'.

⁶ *Ibid*, 8.18.

⁷ *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [26] (Hedley J). Hereafter '*X & Y*'.

⁸ Section 54 (8) HFEA 2008 states that the court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—(a) the making of the order, (b) any agreement required by subsection (6), (c) the handing over of the child to the applicants, or (d) the making of arrangements with a view to the making of the order, unless authorised by the court.

⁹ '*X & Y*', *op cit*, n7; and *Re S (Parental Order)* [2009] EWHC 2977.

¹⁰ See for example, *Re C (A Child)* [2013] EWHC 2413 (Fam); *Re S op cit*, n9; and *J v G* [2013] EWHC 1432 (Fam).

¹¹ See *In The Matter Of D And L (Minors) (Surrogacy) And In The Matter Of Human Fertilisation And Embryology Act 2008* [2012] EWHC 2631 (Fam). Hereafter '*D and L*'. The UK intended

The next part of the chapter explores how international commercial surrogacy affects the rights of the children born as a result of these cross-border arrangements, particularly the right to identity which has become a common theme throughout this thesis. Two specific concerns, which sit uneasily with the child's right to identity inherent in Articles 7 and 8 of the United Nations Convention on the Rights of the Child (CRC), are examined. Firstly, as the interview with Liz demonstrates, international reproductive travel allows intended parents to circumvent UK rules on gamete donor anonymity and to use gametes from jurisdictions where donor anonymity is still protected.¹² Secondly, unlike domestic surrogacy arrangements, international commercial surrogacy does not guarantee that the child will have knowledge of their gestational parent, the surrogate. In India, the surrogate often gives false information to conceal her identity and address because of the stigma she may face from her family and community if it became knowledge that she has been a surrogate.¹³ This means the child is left without any accurate records of their gestational parent. The implications of these concerns are discussed with reference to the UK's donor anonymity rules¹⁴ and the child's right to access to information about their biological and gestational 'parents', inherent in Articles 7 and 8 of the CRC.

The final section of this chapter considers how UK regulation should dissuade intended parents from the 'pull' of international commercial arrangements. It is suggested that regulation should be less restrictive in the UK and policy-makers should consider whether paying surrogates a 'moderate fee', in addition to the reasonable

parents paid twenty-seven thousand US dollars (approximately seventeen thousand pounds at the exchange rate at the time) to the clinic, on the basis that the clinic would then pay 'reasonable expenses' to the surrogate in the sum of three hundred and fifty thousand rupees, approximately four thousand pounds at the current exchange rate. Para [36] (Baker J). This shows how the commercial agencies involved in surrogacy arrangements profit, rather than the surrogate.

¹² In some countries, including Spain, France, and Denmark, the anonymity of gamete donors is explicitly protected by law. See Inmaculada De Melo-Martín, 'The Ethics of Anonymous Gamete Donation: Is There a Right to Know One's Genetic Origins'? 44 *Hastings Center Report*. 28 (2014).

¹³ 'D and L', *op cit*, n11.

¹⁴ Including the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 (SI 1511/2004) (hereafter the '2004 Regulations'), section 24 of the HFEA 2008, and 'Section 24: Register of information (explanatory notes).'

expenses associated with pregnancy,¹⁵ would increase surrogates in the UK and deter intended parents from entering into high-risk cross-border surrogacy arrangements.

7.2 The UK's Ban on Commercial Surrogacy: Has it Encouraged International Commercial Surrogacy Arrangements?

There is a lack of reliable data on surrogacy in the UK.¹⁶ Research indicates that the number of parental orders from international surrogacy increased from 2% in 2008 to 38% in 2014.¹⁷ A Report carried out by CAFCASS relating to parental order applications made in 2013/2014 also found that whilst 59% of the surrogacy arrangements took place in the UK, a significant number (41%) took place overseas.¹⁸ In 2015, the *Myth Busting* Report concluded that the number of UK intended parents who travel internationally for surrogacy from the UK 'is small, but increasing'.¹⁹ Therefore, from the limited data that does exist, it is known that international surrogacy is increasing. This trend is not unique to the UK and in 2012 The Permanent Bureau's preliminary report on the *Issues Arising from International Surrogacy*

¹⁵ A Alghrani, D Griffiths and M Brazier "Surrogacy Law: From Piecemeal Tweaks to Sustained Review and Reform" in Alison Diduck, Noam Peleg and Helen Reece, (eds) *Law In Society: Reflections on Children, Family, Culture and Philosophy- Essays in Honour of Michael Freeman* (2014, Brill Publishers) pp425-453.

¹⁶ A Alghrani and D Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform', [2017] *Child and Family Law Quarterly*, 165, p171.

¹⁷ *Ibid*, p4. Citing updated figures from M Crawshaw, E Blyth and O Akker, 'The changing profile of surrogacy in the UK – Implications for national and international policy and practice' (2012) 34(3) *Journal of Social Welfare and Family Law* 265.

¹⁸ *Cafcass Study of Parental Order Applications made in 2013/14*, July 2015. Available at [https://www.cafcass.gov.uk/media/257188/intranet4cafcass/DavWWWRoot/ce/policy_team/Shared%20Documents/Research/Cafcass%20research/201415/Surrogacy/Study%20of%20parental%20order%20applications%202013-14%20\(internet\).pdf](https://www.cafcass.gov.uk/media/257188/intranet4cafcass/DavWWWRoot/ce/policy_team/Shared%20Documents/Research/Cafcass%20research/201415/Surrogacy/Study%20of%20parental%20order%20applications%202013-14%20(internet).pdf) (last accessed 15/04/16).

¹⁹ 'Surrogacy in the UK: Myth busting and reform', *Report of the Surrogacy UK Working Group on Surrogacy Law Reform*, November 2015, p18. Available at <https://kar.kent.ac.uk/59740/1/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> (last accessed 16/09/18).

*Arrangements*²⁰ noted that ‘international surrogacy arrangements are growing at a rapid pace and, unfortunately, so too appear to be the difficulties arising from them’.²¹

(I) Is UK Surrogacy Regulation Overly Restrictive?

The Permanent Bureau explained that prospective parents who are prohibited or restricted from using surrogacy at home travel to a jurisdiction with a more liberal approach.²² It suggests that ‘the growth in these cross-border arrangements has undoubtedly been facilitated by the Internet, other modern means of communication, and the ease of international travel.’²³ Although surrogacy is not prohibited in the UK, regulation is restrictive. The Surrogacy Arrangements Act 1985 (SA Act) prohibits commercial surrogacy in the UK including, commercial payments to the surrogate²⁴ or third-party agencies,²⁵ advertising to be a surrogate²⁶ or appeal for a surrogate,²⁷ surrogacy contracts²⁸ and commercial agencies.²⁹ Legal motherhood is automatically assigned to the surrogate ‘and no other woman’,³⁰ which causes uncertainty for the intended parents.³¹ It is suggested that these factors have created a restrictive surrogacy regime in the UK which has in turn led to a shortage of surrogates. This has resulted

²⁰ Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues From International Surrogacy Arrangements*, Preliminary Document No 10 (March 2012), (‘Permanent Bureau Preliminary Report’) available at <<https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf>> (last accessed 28/04/16).

²¹ *Ibid*, para 2, p5.

²² *Ibid*, para 5, p7.

²³ *Ibid*.

²⁴ Section 54(8) of the HFEA 2008 limits the surrogate’s pay to ‘reasonable expenses’.

²⁵ Section 2(3) Surrogacy Arrangements Act 1985.

²⁶ Section 3(1)(a).

²⁷ Section 3(1)(b).

²⁸ Section 1A.

²⁹ Section 2.

³⁰ Section 33 HFEA 2008.

³¹ See chapter 5 (section 5.1) for discussion of the motherhood provision in section 33 HFEA 2008.

in UK intended parents travelling overseas to find a surrogate,³² in jurisdictions including India,³³ the US³⁴ and the Ukraine.³⁵

It must be questioned whether the domestic ban on commercialisation, particularly payments to surrogates, is sustainable considering the problems caused by international commercial surrogacy arrangements. This thesis is primarily concerned with allowing payments to the surrogate and suggests that changes should not be introduced to allow commercial surrogacy agencies to operate in the UK. The SA Act 1985, which prohibits commercial surrogacy – including payments to the surrogate – was introduced following two controversial surrogacy cases. The first case of commercial surrogacy to come before the British courts was *A v C*,³⁶ which was heard in 1976. The intended parents, Mr A and Mrs B offered a prostitute £3500, to have Mr A's child. She refused, but for £500 located a 19-year-old woman, Miss C, who agreed to bear Mr A's child for £3000 and at birth to hand over the child to the couple. Miss C was artificially inseminated with Mr A's sperm at a clinic and gave birth to a son. However, Miss C changed her mind and refused to surrender the child. Mr A was initially granted access to the child, but this was withdrawn on appeal. The arrangement was described by Ormrod LJ as a 'totally inhuman proceeding'³⁷ and a 'sordid commercial bargain'.³⁸ In 1985, the '*Baby Cotton*'³⁹ case emerged. It involved Kim Cotton, a married mother of two, who received £6,500 for acting as a surrogate for an infertile couple living in the US. After local authority intervention, the intended parents were granted wardship of the child by the courts. In the judgment, Latey J

³² 'Childless UK Couples Forced Abroad to Find Surrogates', The Guardian, 20th February 2016, <<https://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogates>> (last accessed 16/09/18).

³³ '*D and L*', *op cit*, n11

³⁴ *RE: PM (Parental Order: Payments)* [2013] EWHC 2328 (Fam).

³⁵ '*X v Y*', *op cit*, n7.

³⁶ [1985] FLR 445. The case was not reported until 1985.

³⁷ *Ibid*, p454.

³⁸ *Ibid*, p457.

³⁹ *Op cit*, n4.

referred to the ‘difficult and delicate problems of ethics, morality and social desirability raised by surrogacy’.⁴⁰

It was against this background of hostility towards commercial surrogacy, that Parliament passed the SA Act 1985. The Act was also heavily influenced by the recommendations of the *Warnock Committee*⁴¹ which was concerned with the ‘risk of commercial exploitation of surrogacy’.⁴² It recommended that:

‘[L]egislation be introduced to render criminal the creation or the operation in the UK of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother’.⁴³

The majority held that even in compelling medical circumstances, ‘the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case’.⁴⁴ The SA Act 1985 remains the principal legislation regulating surrogacy in the UK, and prohibits commercial arrangements.⁴⁵ Advertisements offering to be a surrogate⁴⁶ or looking for a woman willing to become a surrogate⁴⁷ are prohibited and any arrangements are unenforceable.⁴⁸ Under section 54(8) HFEA 2008, payments to surrogates cannot exceed ‘reasonable expenses’, which Surrogacy UK (SUK) and Childlessness Overcome Through Surrogacy (COTS), two of the main non-profit organisations discussed in the last chapter, estimate to range between £7,000 and £15,000’.⁴⁹

(II) Has Regulation Prevented the Exploitation of Surrogates?

⁴⁰ *Ibid.*

⁴¹ ‘*The Warnock Report*’, *op cit*, n5.

⁴² *Ibid*, 8.18.

⁴³ *Ibid.*

⁴⁴ *Ibid*, 8.17.

⁴⁵ Section 2(1)(a)-(c) SA Act 1985.

⁴⁶ Section 3(1)(a).

⁴⁷ Section 3(1)(b).

⁴⁸ Section 1A.

⁴⁹ A Alghrani, D Griffiths and M Brazier, *op cit*, n15.

It is suggested that the main aim of the SA Act 1985, to prevent the exploitation of women, has been counter-productive.⁵⁰ In 1998, the *Brazier Review* was asked to consider whether payments to surrogates ‘should continue to be allowed and, if so, on what basis’.⁵¹ A major factor in the initiation of the review was a ‘concern about the level of payments being made to surrogate mothers by commissioning couples’.⁵² The Review recommended that payments to surrogates ‘should cover only genuine expenses associated with the pregnancy. Any additional payments should be prohibited in order to prevent surrogacy arrangements being entered into for financial reasons.’⁵³ In 1999, Freeman lamented that the *Brazier Review*:

‘[F]ails to appreciate that withdrawing remuneration from surrogates will only drive potential surrogates away from regulated surrogacy into an invisible and socially uncontrolled world where the regulators will be more like pimps than adoption agencies. There is every reason to control surrogacy and to guard against the perceived problems, but most women will expect to be rewarded’.⁵⁴

This ‘invisible and socially uncontrolled world’⁵⁵ has materialised and it is recalled from the previous chapter, that ‘do-it-yourself’ arrangements facilitated by ‘Facebook’ have led to the exploitation of vulnerable surrogates in the UK.⁵⁶ Moreover, prohibitive regulation has also pushed intended parents into international commercial surrogacy arrangements in jurisdictions like India, where women from poorer socio-economic backgrounds are at risk of exploitation and abuse.⁵⁷ Contrary to the majority

⁵⁰ *The Warnock Report, op cit*, n5, 8.10 and 8.17.

⁵¹ The Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, Cm 4068 (1998), para 5.1. Hereafter ‘*The Brazier Review*’.

⁵² *Ibid.*

⁵³ *Ibid.*, 5.24.

⁵⁴ M Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) 7 *Medical Law Review* 1, p10.

⁵⁵ *Ibid.*

⁵⁶ See *Re Z (Surrogacy agreements) (Child arrangement orders)* [2015] EWFC 36, discussed in chapter 6. Hereafter ‘*Re Z (Surrogacy agreements)*’.

⁵⁷ See for example, K Schanbacher ‘India's Gestational Surrogacy Market: An Exploitation of Poor, Uneducated Women’ 25, *Hastings Women's Law Journal*, 201 2014; and S Saravanan, ‘An ethnomethodological approach to examine exploitation in the context of capacity, trust and experience of commercial surrogacy in India’, *Philosophy, Ethics, and Humanities in Medicine* 2013, 8:10.

of the *Warnock Committee* who hoped surrogacy would ‘wither on the vine’,⁵⁸ the minority’s warning that without regulation ‘couples may give up any hope of a child, may take further risks such as... more miscarriages, or may decide to venture into some sort of “do-it-yourself” arrangement’⁵⁹ has materialised.

It is suggested that the limit on payments to surrogates, which is set at ‘reasonable expenses’, does not encourage enough surrogates to offer their help in the UK. The shortage of surrogates in the UK was perceived to be a problem by Liz, who had twins using surrogacy in India. She explained that she had initially tried Surrogacy UK, but:

‘[T]hey had a two-year waiting list to even take your notes or match you up. There were two websites and I tried them both and there was such a demand for it. It was very difficult and such a delay, and time was moving on... it was a waste of time to be waiting.’⁶⁰

Alongside the two-year wait, Liz was of the view that ‘not many surrogates come forward’⁶¹ in the UK, and her concern that time was running out fuelled her decision to look overseas. Moreover, she found that there was a shortage of egg donors in the UK and decided to find a donor using an agency in California. After much research, Liz decided to enter a surrogacy arrangement in India, as a result of which twins were born to two different surrogates using her husband’s sperm and donor eggs.

Another case study involved Steve, who was a father through surrogacy. He decided to use surrogacy with his same-sex partner in the US. The couple lived in Scotland and originally joined SUK to try and find a surrogate. By this point the couple had already made their embryos which were stored in the USA.⁶² Steve and his partner were part of SUK for almost two years but were not successful in finding their surrogate:

⁵⁸ *The Brazier Review*, *op cit*, n51.

⁵⁹ *The Warnock Report*, *op cit*, n5, p88 (para 4), dissenting opinion of Greengross and Davies.

⁶⁰ Interview 05IM, recorded on 27.08.16 (on file with the author).

⁶¹ *Ibid.*

⁶² The embryos were created using Steve’s sperm and his sister-in-law’s eggs.

‘A lot of the surrogates we felt were based in England, not Scotland which we felt put some surrogates off...The number of surrogates were very, very small compared to the number of families wanting to use surrogacy. So, we decided it wasn’t going to work within a reasonable time frame, so we decided to go to the States.’⁶³

The couple’s isolated position in Scotland, the long waiting time with SUK and the shortage of surrogates were factors that drove Steve and his partner overseas. Steve’s partner was American, and their embryos were in America which made it easier to go there. The couple also had family in the US which made surrogacy in the States an option. They met their surrogate through a good friend and formalised this through the help of an agency. The surrogate was a doctor, with her own family, and had been a surrogate before. The couple felt ‘these were good early indications that [the surrogate] was a good match for us’.⁶⁴ At the time of the interview Steve is the father of an eight-month baby, born as a result of this successful surrogacy. Liz and Steve’s experiences indicate that the shortage of surrogates in the UK (which could be due to reasonable expenses being inadequate and / or a lack of advertising) and long waiting times with organisations like SUK, are factors that encourage international commercial surrogacy arrangements. Part 7.5 of this chapter critically examines whether ‘moderate’ payments (as distinct from a full model of commercialisation) should be allowed in the UK to help encourage more surrogates to offer their help.

7.3 ‘Trekking Through the Thorn Forest’: The Practical and Legal Problems Arising from International Commercial Surrogacy?

Given the incidence of international commercial surrogacy, this section explores the problems arising from these arrangements for UK intended parents and their children. The judiciary, who have been at the forefront of interpreting section 54 HFEA 2008 and deciding parental order applications, have consistently warned UK intended parents against using international surrogacy to create a family. Hedley J in ‘*X and Y*’⁶⁵ famously described international surrogacy as ‘less a journey along a primrose

⁶³ Interview 04IF, recorded on 07/10/16 (on file with the author).

⁶⁴ *Ibid.*

⁶⁵ *Op cit*, n7.

path, more a trek through a thorn forest.’⁶⁶ In *CW v NT and another*,⁶⁷ Baker J also warned intended parents against resorting to the ‘dangerous and murky waters’⁶⁸ of the internet.

(I) Financial Problems and Delay

A major problem with international commercial surrogacy arrangements for intended parents, is the ‘obvious difficulties of inconvenience, delay, hardship and expense’.⁶⁹ Liz, the mother who had twins using two surrogates from India, explained that it was very difficult and costly living in India. Moreover, her husband left after two weeks which meant she was alone in an unfamiliar environment for three months. She explained how the British Embassy in India was ‘horrendous’ and ‘didn’t want to know’ about her situation. This made her feel unsupported and she spent her time either on the phone or emailing people to make sure she could get back to the UK with her twins:

‘I was the only English person there [at the embassy], fighting for queuing, it’s very, very hard. You are allowed to leave India, you have an exit visa. They send a field social worker out just to do a brief investigation, to make sure the surrogates had been paid, check that the babies were healthy and had their vaccinations and you had to go back and they stamp your passports.’⁷⁰

She also had to pay more money to hire immigration solicitors in London ‘to try and get me back to England’.⁷¹ She found the British Consulate unhelpful and required everything to be in paper format. In addition, the Consulate only sent documents to the UK every Friday which meant waiting the entire week before the application for travel documents could progress. After finally getting permission to leave India and enter the UK with her twins, she experienced more inconvenience when she returned home; since she had been away for so long there had been a burst pipe in the house

⁶⁶ [2] (Hedley J).

⁶⁷ [2011] EWHC 33.

⁶⁸ [38] (Baker J).

⁶⁹ ‘*X & Y*’, *op cit*, n7, [26] (Hedley J).

⁷⁰ Interview 05IM, recorded on 27.08.16 (on file with the author).

⁷¹ *Ibid.*

with water and snow everywhere. Overall, the surrogacy in India was very expensive and Liz disclosed that she is heavily in debt and ‘still paying huge mortgage payments now because of it.’⁷²

Steve also experienced inconvenience and expense as a result of the US commercial surrogacy arrangement. He explained that the UK’s reasonable expenses requirement was an irony: ‘The High Court wants to approve those expenses as reasonable. The irony being that you have to get really expensive legal representation.’⁷³ He disclosed that his legal fees were £25,000 and the surrogacy cost around £200,000. He found it unsatisfactory that only those who have the financial means, can use surrogacy in the US.⁷⁴ Like DIY arrangements, this suggests that the procreative liberty seemingly created by international commercial surrogacy is an ‘illusion’. Only intended parents who can afford to travel overseas, pay for a surrogate and / or gametes, and pay for legal advice to return home, can have a family in this way. Even where the prospective parents have the money, they can be left in debt afterwards, a situation Liz found herself in. Intended parents would not have to pay such high fees⁷⁵ to create a family of their own if UK legislation made surrogacy accessible in the UK.

(II) Conflict of Laws: ‘Marooned Stateless and Parentless’⁷⁶

The second problem arising from international commercial surrogacy relates to difficult conflict of law issues ‘which may have wholly unintended and unforeseen consequences’.⁷⁷ Difficulties have arisen because legal developments about who should be assigned legal parentage in surrogacy cases have not been globally uniform. By contrast, for adoption, regulation exists at an international level through The 1993 *Hague Convention on Protection of Children and Co-operation in Respect of*

⁷² *Ibid.*

⁷³ Interview 04IF, recorded on 07/10/16 (on file with the author).

⁷⁴ *Ibid.*

⁷⁵ Part 7.4 of this chapter considers whether moderate payments to surrogates should be allowed in the UK.

⁷⁶ *X v Y, op cit*, n7, [10] (Hedley J).

⁷⁷ *Ibid.*, [27] (Hedley J).

Intercountry Adoption.⁷⁸ This protects children and their families against the risks of ‘illegal, irregular, premature or ill-prepared adoptions abroad’.⁷⁹ No comparative international regulation exists for surrogacy and regulation differs significantly around the world. In some countries, including Canada⁸⁰ and the UK⁸¹ altruistic surrogacy is legal whilst commercial surrogacy, which is characterised by profit-making agencies, enforceable contracts, and payment to the surrogate, is illegal. In the US surrogacy laws vary from state to state. Countries including France,⁸² Italy,⁸³ and Pakistan,⁸⁴ prohibit all surrogacy arrangements whether commercial or altruistic. At the other extreme, commercial surrogacy is legal in India, the Ukraine⁸⁵ and Russia.⁸⁶ Unsurprisingly, these disparities create conflict of laws for UK intended parents who enter international arrangements.

The case of *X and Y*⁸⁷ demonstrates the problems that arise from these conflicts, including parental status and statelessness. The case concerned a UK couple who had twins after entering an overseas surrogacy arrangement in the Ukraine with a married Ukrainian surrogate.⁸⁸ When the twins were born, the Ukrainian surrogate was recognised as the legal mother in UK law under section 27(1) of the HFEA 1990.⁸⁹ Moreover, her husband was recognised as the legal father by virtue of section 28 HFEA 1990.⁹⁰ However, under Ukrainian law neither the surrogate nor the husband

⁷⁸Convention of 29 May 1993, hereafter the ‘*Hague Convention*’. Available at <http://www.hcch.net/index_en.php?act=conventions.text&cid=69> (accessed 11/01/15).

⁷⁹ Hague Conference on Private International Law, webpage, <http://www.hcch.net/index_en.php?act=text.display&tid=45> (accessed 11/05/15).

⁸⁰ The Assisted Human Reproduction Act (*AHR Act*) 2004.

⁸¹ The SA Act 1985.

⁸²Article 17/6 of the Civil Code.

⁸³ Act n.40 of 19/2/2004, ‘Rules about medically assisted reproduction’.

⁸⁴ The Guardian and Wards Act 1890.

⁸⁵ Family Code of Ukraine, article 123(2).

⁸⁶ The Family Code 1995.

⁸⁷ *Op cit*, n7.

⁸⁸ [4] (Hedley J).

⁸⁹ [5] (Hedley J). Now section 33 HFEA 2008.

⁹⁰ [5] (Hedley J).

had legal responsibility for the twins once they had been born.⁹¹ Consequently, the children were ‘marooned stateless and parentless’ with no right to remain in the Ukraine and no right to enter the UK.⁹²

After considerable delay, the children were given permission to enter the UK outside the ordinary rules once the intended parents had satisfied the UK immigration authorities that the intended father was the biological father of the twins.⁹³ The intended parents then sought to regularise their status as parents by applying for a parental order. Hedley J could make a parental order having found that the conditions in section 30 of the HFEA 1990 had been satisfied.⁹⁴ However, according to section 30(5) HFEA 1990 ‘The Court must be satisfied that both the father of the child...and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order.’⁹⁵ In this case, Hedley J found that the Ukrainian surrogate had given the requisite consent. The intended parents argued that although the surrogate’s husband had given consent, it should not be a requirement.⁹⁶ Hedley J did not accept this and found that Parliament cannot be taken to have had any different intention in relation to husbands of foreign domicile.⁹⁷

This is problematic because the provision allows the husband / spouse of the surrogate to prevent a parental order being granted to UK intended parents, whilst the laws of their own country (Ukraine) relieve them of any parental responsibility. This means the intended parent’s right to have a child ‘may depend both upon the unswerving commitment of the surrogate (and her husband if she has one)...and upon their honesty in not taking advantage of their absolute veto’.⁹⁸ The surrogacy ‘resulted in enormous delay, stress and expense’.⁹⁹ In terms of the UK couple’s right to become parents, the

⁹¹ [8] (Hedley J).

⁹² [10] (Hedley J).

⁹³ [10] (Hedley J).

⁹⁴ [25] (Hedley J).

⁹⁵ Section 35 HFEA 2008 provides that the surrogate’s husband is the child’s legal father.

⁹⁶ [14] (Hedley J).

⁹⁷ [16] (Hedley J).

⁹⁸ [27] (Hedley J).

⁹⁹ [2] (Hedley J).

case shows that it is a limited one in the context of international surrogacy because of the conflicting laws relating to parenthood. The fact the surrogate's husband can veto the parental order is nonsensical and a severe limitation on the intended parent's right to become legal parents of their children.

The same conflict of laws arose again in *Re: IJ (A Child)*,¹⁰⁰ a case also heard by Hedley J. The child was born in the Ukraine and was conceived as a result of the fertilisation of an egg from an anonymous donor and by sperm from the intended father.¹⁰¹ Again, under Ukrainian law the parents of IJ were the UK intended parents, but under UK domestic law the legal parents of IJ were the surrogate and her husband.¹⁰² There were real problems involved in obtaining immigration clearance for the entry of IJ into the UK which were exacerbated by IJ in the meantime requiring some hospital treatment.¹⁰³ The problem is that, 'all overseas jurisdictions can confer parental status on the commissioning couple but that status is not recognised in our domestic law...'.¹⁰⁴ Once again, the conflict of laws issue relating to parenthood shows that the right to procreate, and become legal parents, depends on the commitment of the international surrogate and her spouse or partner.¹⁰⁵

An instrument for regulating surrogacy at the international level could help resolve the conflict of laws that permeate international commercial surrogacy arrangements. Trimmings and Beaumont suggest that a 'framework of co-operation amongst Contracting States',¹⁰⁶ like the 'Hague Convention' on Intercountry Adoption, could help to 'promote the exchange of information and the transmission of documents',¹⁰⁷

¹⁰⁰ [2011] EWHC 921 (Fam).

¹⁰¹ [2].

¹⁰² [3].

¹⁰³ [3].

¹⁰⁴ [4].

¹⁰⁵ The same issue also arose in *AB v DE* [2013] EWCH 2413 (Fam).

¹⁰⁶ K Trimmings and P Beaumont 'International Surrogacy Arrangements: An Urgent Need For Legal Regulation At The International Level', *Journal of Private International Law* Vol. 7 No. 3, December 2011, pp627-647, p635.

¹⁰⁷ *Ibid*, p636.

between the country where the surrogacy took place and the intended parents' country of origin. This exchange of information could help facilitate practical solutions, resolve conflict of laws relating to parentage, and 'reduce 'limping' or unrecognised surrogacy arrangements'.¹⁰⁸ Formulation of a Hague type Convention for surrogacy is yet to be formalised. Therefore, this chapter focuses on reforms to encourage UK intended parents to use surrogacy in the UK thus avoiding the cost, travel and legal complications of cross-border arrangements.

(III) The 'Reasonable Expenses' Conundrum: Child Welfare and Public Policy

A further conflict of laws arising from international commercial surrogacy relates to payment. Section 54(8) of the HFEA 2008 only allows 'reasonable expenses', however, the judiciary have retrospectively authorised payment that goes far beyond reasonable expenses in international surrogacy cases. The first English decision to deal with a commercial international surrogacy arrangement was *X and Y*.¹⁰⁹ Hedley J turned to Section 30(7), which is now contained in section 54(8) HFEA 2008. The provision stipulates that no money or other benefit, other than for expenses reasonably incurred, must have been given or received by the husband or wife (unless authorised by the court) for 'the making of the order', 'any agreement required by subsection (5) above', 'the handing over of the child to the husband and the wife', or 'the making of any arrangements with a view to the making of the order'.

In *X and Y*, the intended parents agreed to pay €235 per month to the surrogate during the pregnancy and a lump sum of €25,000 on the live birth of the twins.¹¹⁰ It was conceded that the sums paid significantly exceeded 'expenses reasonably incurred'.¹¹¹ Hedley J stated that this was 'inevitable on the basis of the applicants' own evidence that the surrogate mother intended to use some of the

¹⁰⁸ *Ibid.*

¹⁰⁹ *Op cit*, n7.

¹¹⁰ [17] (Hedley J).

¹¹¹ *Ibid.*

money to put down a deposit for the purchase of a flat...'.¹¹² Due to the reasonable expenses requirement, now contained in section 54(8) HFEA 2008, the parental order application could not succeed unless the court authorised the payments which exceeded reasonable expenses. Hedley J used the test adopted by Wall J in *Re C*¹¹³ to determine whether the payments could be authorised. Wall J identified two questions: (i) whether the payment was indeed for 'expenses reasonably incurred', a pure question of fact; and (ii) if not, whether the court could or should authorise such payments.¹¹⁴ Wall J concluded that retrospective authorisation was legally possible and, for the same reasons, Hedley J shared that view.

In relation to the public policy issues, (i.e. public concern with commercial surrogacy), Hedley J stated that 'the cases in effect suggest (and I agree) that the court pose itself three questions'.¹¹⁵ The first asks whether the sum paid is disproportionate to reasonable expenses. The second asks whether the applicants acted in good faith and without 'moral taint' in their dealings with the surrogate. The final questions whether the applicants tried to defraud the authorities. In *Re S*¹¹⁶ Hedley J explained the three public policy concerns associated with the retrospective approval of payments:

'(1) To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country.

(2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.

¹¹² [18] (Hedley J).

¹¹³ (*Application by Mr. and Mrs. X under Section 30 of the Human Fertilisation and Embryology Act 1990*) [2002] 1FLR 909.

¹¹⁴ *Op cit*, n7, [19] (Hedley J).

¹¹⁵ [21] (Hedley J).

¹¹⁶ [2009] EWHC 2977.

(3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.’¹¹⁷

In *X and Y*, Hedley J had no doubt that the intended parents were acting in good faith and that no advantage was taken of the surrogate.¹¹⁸ Moreover there was never any suggestion of any attempt to defraud the authorities and Hedley J was satisfied that the intended parents ‘sought at all times to comply with the requirements of English and Ukrainian law as they believed them to be.’¹¹⁹ However, Hedley J found the first question more difficult and observed that ‘its answer may vary considerably depending upon where the arrangement was made’.¹²⁰ He explained, that ‘the whole basis of assessment will be quite different in say urban California to rural India’,¹²¹ and the ascertainment of what amounts to reasonable expenses should be a question of fact in each case.¹²² In the present case Hedley J accepted that living costs in the relevant part of the Ukraine (a big city) bear comparison with those in the UK and concluded that ‘the sums paid were not so disproportionate to ‘expenses reasonably incurred’ that the granting of an order would be an unacceptable affront to public policy’.¹²³ Moreover, he found that the welfare of the two children require that they be regarded as lifelong members of the applicants’ family which could be realised through the award of a parental order.¹²⁴ In this particular case Hedley J authorised the payments.

Nevertheless, Hedley J felt ‘bound to observe that I find this process of authorisation most uncomfortable’.¹²⁵ He noted that the judiciary has to balance ‘two competing

¹¹⁷*Op cit*, n7, [7] (Hedley J).

¹¹⁸ [21] (Hedley J).

¹¹⁹ [22] (Hedley J).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ [24] (Hedley J).

and potentially irreconcilably conflicting concepts’,¹²⁶ namely, the legislature’s objection to commercial surrogacy, as evident from the SA Act 1985 and the reasonable expenses requirement in section 54(8) HFEA 2008, and the consequences of not awarding the parental order for the welfare of the child:

‘The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.’¹²⁷

Following the introduction of the Parental Orders Regulations 2010, the reasonable expenses conundrum has been exacerbated as it has become more difficult to ‘balance’ public policy concerns with child welfare. As Hedley J explained in *Re L (Commercial Surrogacy)*¹²⁸ the effect of the Regulations is to ‘weight the balance between public policy considerations and welfare...decisively in favour of welfare.’¹²⁹ Hedley J concluded that ‘it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations supports its making.’¹³⁰ This approach was endorsed by the then President of the Family Division, Sir Nicholas Wall, in another case named *Re X and Y*.¹³¹ Accordingly, the balancing exercise between child welfare and public policy objections to commercial surrogacy has become a futile one, with child welfare likely to ‘triumph’ in every case.¹³² This means international commercial surrogacy arrangements have made it difficult for the judiciary to maintain the prohibitive stance of the SA Act 1985. The Act maintains that commercial surrogacy is illegal, yet the courts are likely to authorise commercial payments because failure to do so would not benefit the child.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam).

¹²⁹ *Ibid.*, [10] (Hedley J).

¹³⁰ *Ibid.*, [10] (Hedley J).

¹³¹ *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2011] EWHC 3147 (Fam). [36], [40].

¹³² C Fenton-Glynn, ‘Case Commentary: The regulation and recognition of surrogacy under English law: an overview of the case-law’, *Child and Family Law Quarterly*, Vol 27, No 1, 2015, pp83-96. P87.

This reinforces how the patchwork of surrogacy regulation – the SA Act 1985 and the Parental Order Regulations 2010 – is contradictory and requires reform.

The redundancy of the balancing exercise between child welfare and public policy is evident in the court’s flexible interpretation of Hedley J’s first question; whether the sums paid are ‘proportionate’ with reasonable expenses. Payments have ranged from US\$23,000¹³³ and US\$53,000¹³⁴ in California and £3,000 in India.¹³⁵ Despite these high sums, no application for a parental order has been refused on the grounds of section 54(8) HFEA 2008. Fenton-Glynn argues that in order to find these high sums not disproportionate to reasonable expenses, ‘the courts have identified the relative comparator to be the amount given to other surrogates in the same jurisdiction’.¹³⁶ In the case of *Re C*¹³⁷, the payment was found to be proportionate, despite the fact that it was an amount equivalent to one to two years’ average local wage, on the grounds that it was ‘less than the amount reported to be paid to surrogate mothers in St Petersburg, and does not appear unusually high in the context of what is paid in other areas in Russia’.¹³⁸ This suggests that the courts have focused on whether the payment corresponds with what is paid in other areas of the country, rather than any reference to reasonable expenses.¹³⁹ This is evident in *Re G and M*¹⁴⁰ where Theis J found that compensation could be authorised by the court because the sum of money paid to the surrogate, \$38,950, was ‘not significantly different to payments that have been made in similar cases involving US surrogacy arrangements.’¹⁴¹ This is problematic because authorising payment on the basis that it is similar to what is paid to other surrogates in the jurisdiction does not make it ‘proportionate’ to ‘reasonable expenses’. Surrogacy

¹³³ *Re S (Parental Order)*, *op cit*, n9.

¹³⁴ *J v G*, *op cit*, n10. This was made up of the base fee of \$45,000 US Dollars, an additional payment of \$5,000 for a twin pregnancy and \$3,000 as compensation for giving birth by caesarean section.[14] (Theis J).

¹³⁵ *Re A and B (Surrogacy: Domicile)* [2013] EWHC 426 (Fam).

¹³⁶ C Fenton-Glynn, *op cit*, n132, p87.

¹³⁷ *Op cit*, n10.

¹³⁸ *Ibid*, [18] (Theis J).

¹³⁹ C Fenton-Glynn, *op cit*, n132, p87.

¹⁴⁰ [2014] EWHC 1561 (Fam).

¹⁴¹ [39] (Theis J). The sum paid to the surrogate was \$38,950.

regulation is contradictory. The SA Act 1985 prohibits commercial surrogacy, yet the case law shows how commercial surrogacy has effectively been introduced through the back door. Part 7.5 of this chapter questions whether the supposedly altruistic model of surrogacy that operates in the UK is sustainable, or whether moderate payment to surrogates should be allowed.

7.4 International Commercial Surrogacy and the Child's Identity Rights

The next issue explored in this chapter, is how international commercial surrogacy affects the child's identity. Achmad notes that international commercial surrogacy arrangements create risks for specific aspects of the child's identity including: the genetic and biological, personal narrative, and cultural elements.¹⁴² Reproductive travel allows UK intended parents to circumvent UK rules on gamete donor anonymity and use gametes from jurisdictions where donor anonymity is still protected.¹⁴³ It is considered how this affects the child's genetic identity. Furthermore, international commercial surrogacy does not guarantee that the child will have knowledge of their gestational parent, the surrogate, thus putting the child's genetic identity, personal narrative, and cultural identity at risk and raising concerns for Articles 7 and 8 CRC, and Article 8 ECHR.

(I) Using Cross-Border Fertility Treatment to Circumvent Donor Anonymity Rules: Implications for the Child's Right to Identity?

In 2011, Culley *et al.*, reported findings from their qualitative study of UK residents with experience of cross-border care.¹⁴⁴ The study captured the socio-demographic characteristics of UK travellers, their reasons for seeking treatment abroad, the treatments they sought, the destinations they chose, and the outcomes of their

¹⁴² C Achmad, 'Answering the 'Who am I' Question', chapter 8 in *Children's Rights in International Commercial Surrogacy: Exploring the Challenges from a Child's Rights, Public International Human Rights Law Perspective*, (2018), p204.

¹⁴³ Inmaculada De Melo-Martín, *op cit*, n12.

¹⁴⁴ L Culley, N Hudson, F Rapport, E Blyth, W Norton and A.A Pacey, 'Crossing Borders for Fertility Treatment: Motivations, Destinations and Outcomes of UK Fertility Travellers', *Human Reproduction*, Vol.26, No.9 pp. 2373–2381, 2011. P2373.

treatment.¹⁴⁵ The four most commonly mentioned reasons for travel were: donor shortages in the UK (27 cases), cost (13 cases), perceived better success rates overseas (12 cases) and previous unsatisfactory care in the UK (7 cases).¹⁴⁶ A previous study by Shenfield also found that 26% of UK women indicated ‘a wish for anonymous donation’ as one of their reasons for travelling abroad.¹⁴⁷ The reasons identified for cross-border fertility treatment accord with Liz’s experience. She chose surrogacy overseas because she wanted to be treated by a consultant in India who she was more ‘confident in... rather than anyone else’.¹⁴⁸ She also perceived there to be a lack of egg donors in the UK and wanted the egg donor to be anonymous. She attributed the shortage of UK egg donors to the removal of donor anonymity:

‘Now because of the traceability, there’s hardly anyone doing it. There’s a lack of sperm being donated and there’s a lack of donors because of there’s no anonymity. The ones that are donating eggs in the UK usually have fertility problems themselves, you see.’¹⁴⁹

Before finding her surrogates in India, she contacted a clinic in California to find an anonymous egg donor. The clinic gave her a catalogue of anonymous donors which included pictures. Liz chose an egg donor who lived in Cape Town and wrote to her to explain why she wanted children and how she wanted to bring the children up. Liz’s doctor in India arranged for the egg donor to travel to India at the same time as Liz, so that the embryos could be created using the husband’s sperm and the donor’s eggs. Liz never met the egg donor, but she had a portfolio of her and explained that ‘I know everything about her. What her Grandparents died of and pages and pages of pictures of her growing up... It suited me fine really.’¹⁵⁰

¹⁴⁵ *Ibid*, p2373.

¹⁴⁶ *Ibid*, p2375.

¹⁴⁷ *Ibid*, p2379.

¹⁴⁸ Interview 05IM, recorded on 26/08/16 (on file with the author).

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*.

It is argued that the circumvention of UK donor laws is problematic from a children's rights perspective, particularly for the child's ability to learn about their 'genetic and biographical heritage'.¹⁵¹ As Hedley J cautioned in *X and Y (Foreign Surrogacy)*:

'As babies become less available for adoption and given the withdrawal of donor confidentiality (wholly justifiable, of course, from the child's perspective), more and more couples are likely to be tempted to follow the applicant's path to commercial surrogacy in those places where it is lawful, of which there may be many.'¹⁵²

The withdrawal of donor anonymity, which Hedley J found to be 'wholly justifiable from the child's perspective' began in 2004, when the Government introduced the 2004 Regulations.¹⁵³ The right to establish details of one's identity and the 2004 Regulations were discussed in detail in chapter 5.¹⁵⁴ It is recalled that the 2004 Regulations required the HFEA to collect additional non-identifying donor information that could be made available to a donor-conceived person. In addition, from 1 April 2005, all new donors have been required to provide identifying information (listed in s.2(3) 2004 Regulations), which will be made available to any donor-conceived person seeking this information who has reached the age of 18. These changes were influenced by two 'direct challenges to the UK's position on donor anonymity';¹⁵⁵ the case of Joanna Rose¹⁵⁶ and the United Nations Committee on the Rights of the Child (2002), which questioned the compatibility of donor anonymity with the principles and provisions of the CRC.¹⁵⁷ Access to one's genetic

¹⁵¹ E Blyth and L Frith, 'Donor-Conceived People's Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity', *International Journal of Law, Policy and the Family* 23, (2009), pp174-191, p175. See also chapter 5 (section 5.3) which discusses the right to establish details of one's identity.

¹⁵² *Op cit*, n7, [26] (Hedley J).

¹⁵³ *Op cit*, n14.

¹⁵⁴ See part 5.3.

¹⁵⁵ E Blyth, L Frith, C Jones, and J Speirs, 'The role of birth certificates in relation to access to biographical and genetic history in donor conception', *International Journal of Children's Rights*, 172 (2009) pp207-233. P209.

¹⁵⁶ *R (on the application of Rose and another) v Secretary of State for Health and another* [2002] EWHC 1593 (Admin). Hereafter '*Rose and another*'. See chapter 5 (section 5.3) for discussion of the case.

¹⁵⁷ Blyth *et al.*, *op cit*, n155, p211.

origins information affects a number of rights within the CRC and ECHR, including the best interests of the child (Article 3 CRC), the right to know one's parents (Art 7 CRC), respect for identity (Art 8 CRC), private and family life (Art 8 ECHR) and protection against discrimination (Art 14 ECHR and Art 2 CRC).

As a result of these two direct challenges, the UK Government launched a public consultation on the information to be provided to donor-conceived people in 2001.¹⁵⁸ 211 responses supported the provision of non-identifying information, whereas just 17 were against; some of the latter were opposed to the provision of non-identifying information because they believed only identifying information would suffice.¹⁵⁹ The most frequently stated reasons for supporting the change related to the rights of the child, which were seen as exceeding those of the social parent (i.e. the person who raises the child) and the donor.¹⁶⁰ Many were in favour of the change because they felt it was a basic human right to know one's origins; non-identifying information would help the child's 'emotional well being, sense of self and self esteem' and give the child a 'solid sense of identity'.¹⁶¹ Consultees also felt that identifying information would help the child understand their 'cultural and social identity' and 'genetic/medical information'.¹⁶² Finally, some consultees were of the view that non-identifying information would bring donor laws in line with the access to information which adopted children have.¹⁶³ Interestingly, 22 people who had donated sperm, eggs or embryos were in favour of the provision of non-identifying information, whereas just one was against.¹⁶⁴ On the basis of the consultation and responses, the Government introduced the 2004 Regulations and from 1st April 2005, UK law was changed to

¹⁵⁸ Department of Health, (2001) *Providing Information about Sperm, Egg and Embryo Donors: Consultation Document* (London: Department of Health).

¹⁵⁹ Department of Health (2003) *Donor Information: Providing information about gamete or embryo donors: Responses to Consultation* (London: Department of Health). Summary of Responses available at http://webarchive.nationalarchives.gov.uk/20070506121826/http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_4071838 (last accessed 20/09/17).

¹⁶⁰ *Ibid*, para 8.

¹⁶¹ *Ibid*, para 9.

¹⁶² *Ibid*.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*, para 33.

allow children born through gamete donation to access *identifying* details of the donor.¹⁶⁵

Nevertheless, international commercial surrogacy allows UK intended parents to circumvent the law and use anonymous gamete donors overseas. This violates a number of rights, including Article 7 (1) CRC which provides that the child shall have a right from birth to ‘know and be cared for by his or her parents’. Where anonymous donors are used, the child is denied the right to knowledge of their genetic ‘parents’. Moreover, the right to access to information about one’s genetic and gestational ‘parents’ is also inherent in Article 8 of the CRC. As Tobin explains of Article 8:

‘States are obliged under international law to take measures to preserve a child’s identity and the Committee on the Rights of the Child has stressed that this extends to maintaining critical records, including family details.’¹⁶⁶

Since UK intended parents are free to use anonymous gamete donors in other jurisdictions, the UK has failed to ensure that critical records and the child’s family details are maintained. The circumvention of donor anonymity also violates the donor-conceived individual’s right to private and family life under Article 8 ECHR. It is recalled that the European Court ruled in *Gaskin*¹⁶⁷ that the UK government had breached Article 8 by denying Mr Gaskin access to the records about him held by the English local authority in whose care he had been placed as a child. The Court concluded that ‘respect for private life requires that everyone should be able to establish details of their identity as individual human beings...’.¹⁶⁸

Blyth and Frith challenge the assumption that changes to donor anonymity in 2005 are responsible for donor shortages in the UK and argue that ‘the decline began well

¹⁶⁵ See chapter 5 (section 5.3) which explains the identifying and non-identifying information donor-conceived individuals can receive.

¹⁶⁶ J Tobin, ‘To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?’, *International and Comparative Law Quarterly*, 63, pp317-352 doi:10.1017/S0020589314000049. P329.

¹⁶⁷ *Gaskin v. United Kingdom* (Access to Personal Files), 1989, Eur Court HR Series A, No. 10454183, 32 YB Eur Conv HR 176, 12, EHRR, 36, 1989.

¹⁶⁸ [39].

before any change in legislation concerning donor anonymity'.¹⁶⁹ Therefore, despite the removal of donor anonymity, intended mothers like Liz may still have faced access problems. Policy-makers should develop measures to attract donors in the UK. One solution would be to increase the maximum number of families that can be created using one donor's sperm or eggs from 10 to 20.¹⁷⁰ The Progress Educational Trust recommends that compensation for expenses 'needs to be variable in order to reflect the fact that expenses themselves vary depending upon the different circumstances in which people find themselves'.¹⁷¹ A further strategy would be to invest in high profile recruitment campaigns.¹⁷² In Victoria (Australia), a doubling of the number of donors was reported following a high-profile recruitment campaign launched by Monash IVF, the State's largest DI programme.¹⁷³ Monash IVF had written to Victoria's male state Members of Parliament under 45, urging them to become donors to help replenish sperm bank supplies. Monash IVF received 70 inquiries from men, of which 14 volunteered their sperm. A similar campaign could be organised in the UK, whereby clinics write to male and female MPs to raise awareness about egg and sperm donation. The recruitment campaign could allay fears that donors (who use a licensed clinic in the UK) will not have any legal obligations to a child born as a result of the donation, will not be named on the birth certificate and will not be required to support the child financially.¹⁷⁴ A longer-term solution would be to encourage a global or European response to remove donor anonymity in all jurisdictions. Such change will take time and disagreement between member states is inevitable. Although discouraging or

¹⁶⁹ E Blyth and L Frith, 'The UK's gamete donor 'crisis' - a critical analysis', *Critical Social Policy* Volume 28 (1): 74-95. P81.

¹⁷⁰ Submitted by the Progress Educational Trust (PET) to the Human Fertilisation and Embryology Authority's Consultation *Donating Sperm and Eggs: Have Your Say*. <http://www.progress.org.uk/hfeadonating>. (<https://www.hfea.gov.uk/donation/emotional-content/>) (last accessed 17/09/18).

¹⁷¹ *Ibid.* The HFEA chose to set a fixed sum of £750 for egg donors, and £35 for sperm donors for each visit to a clinic.

¹⁷² Turkmendag I. 'The voice of silence: UK patients' silent resistance to the assisted reproduction regulations'. Chapter 5 In: Cloatre, E; Pickersgill, M, ed. *Knowledge, Technology and Law: At the Intersection of Socio-Legal and Science & Technology Studies*. London, UK: Routledge, 2015.

¹⁷³ C Nader, (2005), 'Donors Double after IVF Plea', *The Age*, 9 March. Available at, < <http://www.theage.com.au/news/National/Donors-double-after-IVFplea/2005/03/08/1110160832593.html>> (last accessed 25/09/17).

¹⁷⁴ <https://www.gov.uk/legal-rights-for-egg-and-sperm-donors> (last accessed 20/09/18).

banning gamete donor anonymity across member states, or even globally, may restrict reproductive liberty, it is argued that this is justified because of the children's rights implications of not knowing one's origins.¹⁷⁵ As Blyth and Frith observe, '... donor conception should not be practiced at all if – for cultural, religious or other reasons – it cannot be practised nonanonymously.'¹⁷⁶

In addition to increasing gamete donation in the UK, intended parents who require the use of a gamete donor, such as those in Liz's position, need to be educated about the child's right to identity. Although gamete donor anonymity has been removed in the UK, it is recalled from chapter 5¹⁷⁷ that parental disclosure is problematic. A donor-conceived person's ability to access information about their gamete donor hinges on whether the parents inform the child about their conception. Even if the surrogacy is disclosed, the child may not be informed that donor eggs / sperm were used. Jadva *et al.*, found that 'just under half of those who were involved in genetic surrogacy had not disclosed the use of the surrogate mother's egg and thus the child was unaware that the surrogate mother was their genetic mother'.¹⁷⁸ Findings from van den Akker's study of infertile women planning on using surrogacy to start a family also showed that most women would disclose the use of surrogacy but not the use of gamete donation.¹⁷⁹ 97% of participants said they would disclose a surrogacy arrangement whereas only 34% would reveal donor sperm or donor egg origins.¹⁸⁰ Jadva *et al.*, contend that 'by withholding this information, parents are creating a potentially difficult situation whereby they feel they have disclosed the nature of the child's birth but the child does not know the full story'.¹⁸¹ It is argued that this problem could be exacerbated where anonymous donation is used overseas because the child might not

¹⁷⁵ 'Rose and another', *op cit*, n156.

¹⁷⁶ E Blyth and L Frith, 'Donor-Conceived People's Access to Genetic and Biographical History...', *op cit*, n151, p184.

¹⁷⁷ See section 5.3.

¹⁷⁸ V Jadva, L Blake, P Casey and S Golombok, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins', *Human Reproduction*, Vol. 27, No.10 pp. 3008–3014, 2012.

¹⁷⁹ O van den Akker, 'The importance of a genetic link in mothers commissioning a surrogate baby in the UK'. *Human Reproduction* 2000; 15, pp1849–1855.

¹⁸⁰ *Ibid*, p1852.

¹⁸¹ *Op cit*, n178, p3013.

have any record that they were conceived as a result of gamete donation and disclosure will depend solely on their parents. At least in the UK the child can access information about their gamete donor when they reach 16.

(II) The Child's Right to 'Know' their Surrogate?

It is recalled from chapter 5, that providing the child with records of their surrogate would help protect the child's right 'to know' his or her parents, outlined in Article 7 (1) CRC. The right to access information about one's biological and gestational 'parents' is also inherent in Article 8 of the CRC. As Tobin explains of Article 8, 'states are obliged under international law to take measures to preserve a child's identity and the Committee on the Rights of the Child has stressed that this extends to maintaining critical records, including family details.'¹⁸² Tobin argues that it would not be unreasonable for states to insist that organisations facilitating surrogacy arrangements:

'Maintain records of the individuals involved. This information might then be provided to the child at an appropriate time. Importantly, under this model it would be possible to ensure that surrogacy arrangement did not violate the child's right to know his or her parents.'¹⁸³

However, the child's identity rights are jeopardised when he / she is born as a result of an international commercial surrogacy arrangement. This is because of poor record-keeping in some international clinics and the provision of incorrect contact details from surrogates and / or clinics. The case of *In the Matter of D and L*,¹⁸⁴ demonstrates the problems with locating the child's surrogate for the purposes of consent. The case involved parental order applications for twins born as a result of commercial surrogacy arrangements in India. Section 54(6) HFEA 2008, which requires the woman who carried the child to 'have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order', was an issue because the intended

¹⁸² J Tobin, *op cit*, n166, p329.

¹⁸³ *Ibid*, p327.

¹⁸⁴ *Op cit*, n11.

parents had not received any signed consent from the surrogate, and the clinic in India had been unhelpful in helping them find her.¹⁸⁵

The intended parents considered tracking down the surrogate at an address provided to them but were concerned ‘about the impact of any invasion of her privacy’.¹⁸⁶ As such, the couple applied for a parental order without the necessary written consents. Following the hearing before Her Honour Judge Black, the intended parents sought the assistance of an enquiry agent to locate the surrogate.¹⁸⁷ However, the agent was unsuccessful because ‘the address provided by the clinic where Miss B should be residing...is not the place where she lives’.¹⁸⁸ Baker J was able to dispense with section 54(6) because all reasonable steps had been taken to locate the surrogate without success,¹⁸⁹ and thus the court was ‘entitled to take into account evidence that the woman did give consent at earlier times to giving up the baby’,¹⁹⁰ and the Parental Order Regulations 2010 mandate that ‘the child’s welfare is now the paramount consideration when the court is ‘coming to a decision’ in relation to the making of a parental order’.¹⁹¹ Baker J found there was no realistic hope of finding the surrogate and ‘if it is correct that she is living in the state of Andhra Pradesh, then she is one of many millions of women living in that state.’¹⁹²

From the child’s perspective, the court was correct to use section 54(7)¹⁹³ and award the parental orders so that the child’s social parents would be recognised as their legal parents. However, the situation is still unsatisfactory for the children’s identity because they may wish to know or have knowledge of their surrogate, especially as they become older. As Baker J acknowledged *In the Matter of D and L (Minors)*, ‘a surrogate mother is not merely a cipher. She plays the most important role in bringing

¹⁸⁵ [11].

¹⁸⁶ [12] (Baker J).

¹⁸⁷ [14] (Baker J).

¹⁸⁸ *Ibid.*

¹⁸⁹ [28] (Baker J).

¹⁹⁰ [29] (Baker J).

¹⁹¹ [30] (Baker J).

¹⁹² [32] (Baker J).

¹⁹³ The provision states that ‘Subsection (6) does not require the agreement of a person who cannot be found or is incapable of giving agreement...’.

the child into the world. She is a ‘natural parent’ of the child’.¹⁹⁴ Referring to Baroness Hale in *Re G (Children)*,¹⁹⁵ Baker J recalled that there are at least three ways in which a person may be or become a natural parent: genetic, gestational and psychological:¹⁹⁶

‘The act of carrying and giving birth to a baby establishes a relationship with the child which is one of the most important relationships in life’.¹⁹⁷

International commercial surrogacy arrangements create a risk that the child will never have details of their surrogate¹⁹⁸ or even know that they were gestated by a surrogate if the intended parents decide not to inform them. As Achmad argues, a central aspect involved in answering the ‘who am I’ question and preserving one’s identity, ‘is being able to know about one’s own birth; information such as where, when, how and who was present’.¹⁹⁹ This leaves children born as a result of international commercial surrogacy vulnerable to the same disappointment as Joanna Rose and ‘EM’ whose genetic connections were important to them for forming a ‘fuller sense of self or identity’.²⁰⁰ It is argued that if knowledge of one’s donor was considered important enough to remove donor anonymity in 2005, then the child’s right to know details of the surrogate is just as important to their identity.

Although there is a risk that intended parents who use surrogacy in the UK may not inform their child about how they were conceived, the surrogate appears on the child’s original birth certificate by virtue of section 33 HFEA 2008. This ensures that the child has details of his / her gestational parent. It was suggested in chapter 5 that although the surrogate should not be assigned legal motherhood or be recorded as the *legal* mother on the child’s birth certificate, the surrogate should be recorded as the child’s

¹⁹⁴ [24] (Baker J).

¹⁹⁵ [2006] UKHL 43.

¹⁹⁶ *Op cit*, n11, [24] (Baker J).

¹⁹⁷ [25] (Baker J).

¹⁹⁸ The same problem also arose in *AB v CD (Surrogacy - Time Limit and Consent)* [2015] EWFC 12 where the surrogate could not be found for the purposes of consent. Moreover, in *R and S v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22, an international commercial surrogacy arrangement that took place in Ukraine, the surrogate’s whereabouts was also unknown.

¹⁹⁹ C Achmad, *op cit*, n142, p207.

²⁰⁰ ‘Rose and another’, *op cit*, n156, [7].

gestational parent.²⁰¹ Compared to international surrogacy cases, there is more chance of the surrogate having contact with a child domiciled in the same country. Sophie, who had a child through surrogacy with the help of COTS, explained that she was in touch with her child's surrogate 'all the time'.²⁰² She 'felt very strongly that my son should have contact with [the surrogate] and her family because that's a part of his history and I'd never want to deny him of that.'²⁰³ She also believed it was important to be honest with her son, so she always intended to remain in contact with the surrogate.²⁰⁴ After Sophie's son was born, she sent the surrogate 'pictures regularly and little updates on how he was doing'.²⁰⁵ The surrogate also sent Sophie updates on her daughter. Lauren, who became a mother to twins with the help of SUK, also spoke of the 'friendship', 'network', and 'community' she experienced.²⁰⁶ This paints a very different picture from the 'business transaction' described by Liz.²⁰⁷ UK surrogacy arrangements, facilitated by a non-profit organisation like COTS or SUK, should be encouraged because these arrangements set the foundations for long term contact between the parties which could help the child understand their origins.

Identity also involves national origin and cultural identity.²⁰⁸ These aspects of the child's identity are at risk for children born as a result of international surrogacy arrangements, 'given that they are removed from the culture and ethnicity they are born in...'.²⁰⁹ As Achmad notes:

'Unless the commissioning parents in ICS [international commercial surrogacy] arrangements consciously ensure that the child knows their ethnic and cultural

²⁰¹ See chapter 5 (section 5.3).

²⁰² Interview 02IM, recorded on 09/07/16 (on file with the author).

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ Interview 07IM, recorded on 15/07/16 (on file with the author).

²⁰⁷ Interview 05IM, recorded on 26/08/16 (on file with the author).

²⁰⁸ *General comment No. 14* (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (last accessed 20/08/18). Para 55.

²⁰⁹ C Achmad, *op cit*, n142. Chapter 3 'Contextualising a 21st Century Challenge Part Two', p 61.

background and take active steps to ensure these links and knowledge are maintained, the child may end up ethnically and culturally dislocated and isolated.²¹⁰

This disconnection may affect ‘children who remain in their birth country whilst waiting for their status to be recognised or regularised’.²¹¹ During this period, which can last months or even years, children ‘may become accustomed and grow attached to certain cultural aspects of their birth place’,²¹² such as language. Until international reforms are made to mandate that information about the identity of the surrogate (and an egg/sperm donor if involved) is preserved,²¹³ and children born overseas are informed about their ethnic and cultural background, UK policy-makers should encourage intended parents to use surrogacy in the UK.

7.5 Encouraging Intended Parents to Use Surrogacy in the UK: Paying a ‘Moderate Fee’ to Surrogates?

The dichotomy between altruistic surrogacy arrangements, which are permitted in the UK, and commercial surrogacy, which is ‘prohibited’, is unsustainable. Commercial surrogacy has been introduced ‘through the back door’ in the UK as the judiciary are left with little option but to authorise payments that exceed reasonable expenses. To refuse authorisation would leave children without a parental order, thus jeopardising their life-long welfare, which is the court’s paramount concern following the Parental Order Regulations 2010. The unsustainability of the altruistic-commercialisation dichotomy merits reappraisal of the concerns with paying surrogates (the exploitation of women and commodification of children) which were expressed by *Warnock*, *Brazier*, and the judiciary in *Baby Cotton*. This thesis does not propose that a full model of commercialisation should be implemented in the UK. Surrogacy organisations should not be allowed to operate for profit because it could lead to a situation where everyone except the surrogate financially benefits from the

²¹⁰ *Ibid.*

²¹¹ C Achmad, *op cit*, n142. Chapter 8, p208.

²¹² *Ibid.*

²¹³ See K Trimmings and P Beaumont, *op cit*, n106.

arrangement.²¹⁴ It could also lead to a situation where only those intended parents with the financial means can have a child through surrogacy. Nevertheless, it is suggested that ‘moderate’ payment to the surrogate should be introduced, because it is reconcilable with the aspects of altruism that are effective (e.g. the friendship first ethos promoted by SUK) and acknowledges the surrogate’s labour.

The *Warnock Committee* was of the view that ‘a woman who deliberately allows herself to become pregnant with the intention of giving up the child to which she will give birth...is the wrong way to approach pregnancy’.²¹⁵ It was also of the view that surrogacy becomes, ‘positively exploitative when financial interests are involved. It is therefore with the commercial exploitation of surrogacy that we have been primarily ... concerned’.²¹⁶ The Report fails to explain *why* surrogacy becomes exploitative when surrogates are paid and, as McLachlan and Swales argue, it does not adequately address why surrogate motherhood contracts should be illegal.²¹⁷ It is suggested that not paying surrogates enough could in itself be exploitative.

In 1998, the *Brazier Review* was asked to consider whether payments to surrogates ‘should continue to be allowed and, if so, on what basis’.²¹⁸ The Review’s ‘terms of reference specifically excluded a consideration of: ‘commercialisation...that third parties should be able to profit from surrogacy arrangements...and enforceability of contracts’.²¹⁹ It is suggested that this was missed opportunity for considering the advantages of regulated commercial surrogacy for the UK. The *Brazier Review* was accepting of altruistic surrogacy and recommended that payments to surrogates should cover ‘genuine expenses associated with the pregnancy’²²⁰ but swiftly concluded that

²¹⁴ See for example *D and L* where the surrogate received ‘reasonable expenses’ whilst the clinic received twenty-seven thousand US dollars. *Op cit*, n11, [31] (Baker J).

²¹⁵ *Warnock Report*, *op cit*, n5, 8.11.

²¹⁶ *Ibid*, 8.17.

²¹⁷ H McLachlan & J Swales, ‘Surrogate Motherhood: Beyond the Warnock and the Brazier Reports’, (2005), *Human Reproduction & Genetic Ethics*, 11:1, 12-23, DOI: [10.1179/hrge.11.1.h87x5v7366r73831](https://doi.org/10.1179/hrge.11.1.h87x5v7366r73831).

²¹⁸ *Brazier Review*, *op cit*, n51, 5.1.

²¹⁹ *Ibid*, 1.5.

²²⁰ *Ibid*, 5.24. The *Brazier Review* also provided a list of permissible expenses relating to genuine expenses associated with the pregnancy.

payment to surrogates, other than genuine expenses, gave rise to the following concerns:

‘(1) Payments create a danger that women will give a less than free and fully informed consent to act as a surrogate. (2) Payments risk the commodification of the child to be born. (3) Payments contravene the social norms of our society that, just as bodily parts cannot be sold, nor can such intimate services.’²²¹

As such, the *Brazier Review* recommended that ‘any additional payments should be prohibited in order to prevent surrogacy arrangements being entered into for financial reasons’.²²² Brazier’s first concern about the exploitation of women has in fact arisen in the context of ‘altruistic’ DIY arrangements. In *Re Z (Surrogacy agreement)*²²³ the surrogate was a vulnerable woman with learning difficulties who met the intended parents through Facebook. The surrogate was not paid but she was nevertheless exploited,²²⁴ which dispels the myth that only commercial surrogacy creates conditions for exploitation. Therefore, policy-makers should ask, as Shalev has done, whether ‘the prohibition of payment for “surrogate” reproductive services [is] tantamount to moralized slavery’.²²⁵

In addition, the cross-border nature of today’s surrogacy arrangements means that *Brazier’s* concerns in 1998 about exploitation and payment need to be reconsidered within today’s transnational context. It is hypocritical that the ban on commercialisation in the UK continues to be grounded in concerns about the exploitation of women, when regulation allows UK intended parents to enter commercial arrangements overseas and use women from poorer socio-economic countries like India and Ukraine. As Deckha notes in the Canadian context, payment for surrogacy is an offence punishable by up to ten years’ incarceration and a \$500,000 fine, ‘yet Canada will recognize those who acquire a child through legal commercial

²²¹ *Ibid*, Executive summary, 4, p.i.

²²² *Ibid*, 5.24.

²²³ *Re Z (Surrogacy agreements)*, *op cit*, n55.

²²⁴ Russell J stated that given the difficulties that the surrogate had in ‘comprehension and the limitations on her cognitive abilities it is questionable whether she had a full understanding of the process at any stage’, at [7]. See chapter 6 for further discussion.

²²⁵ Carmel Shalev, *Birth Power: The Case for Surrogacy* (Yale UP, 1989), p164.

surrogacy abroad as the legal parent of that child and permit the child to acquire Canadian citizenship'.²²⁶ The UK also bans commercialisation yet the English judiciary routinely authorise commercial payments retrospectively when intended parents return to the UK after using commercial surrogacy overseas.²²⁷ This allows the government to 'sidestep controversy and ignore public ambivalence about the practice's purported immorality.'²²⁸ UK policy-makers need to reassess whether banning payments to UK surrogates merely exports the problem of exploitation to women in poorer socio-economic countries, where the main economic winners are the third-party agencies involved, rather than the surrogate herself.²²⁹

In response to Brazier's second concern, it is suggested that paying surrogate's more than reasonable expenses in the UK would not commodify children. As Freeman notes:

'...The money is paid to the surrogate not to compensate her for giving up the child, nor to 'buy' the child. The money is payment for her services, it is compensation for the burden of pregnancy. The child may have a right not to be sold, but that is a distortion of what is happening, even in cases of commercial surrogacy'.²³⁰

Shalev agrees with Freeman and argues that '... the transaction under consideration is not for the sale of a baby but for the sale of reproductive services'.²³¹ The *Brazier Review's* third concern, that payments contravene the social norms of our society, is problematic because it suggests that women should not choose to receive payment for being a surrogate and must have been exploited where they did accept payment. This attitude was evident in the House of Commons following *Baby Cotton*. Mrs Cotton had no problem with handing the child over to the intended parents, but she was still presented as a victim of exploitation who had been commodified and 'used as a rich

²²⁶ M Deckha 'Situating Canada's Commercial Surrogacy Ban in a Transnational Context: A Postcolonial Feminist Call for Legalisation and Public Funding' (2015) 61 *McGill Law Journal* 31-86, p68.

²²⁷ See part 7.3 which discusses the reasonable expenses conundrum.

²²⁸ M Deckha, *op cit*, n226, p68.

²²⁹ See for example, *D and L Minors*, *op cit*, n11.

²³⁰ M Freeman, 'Is Surrogacy Exploitive?' in S McLean (ed) *Legal Issues in Human Reproduction* (Aldershot: Dartmouth 1989), p178.

²³¹ C Shalev, *op cit*, n225, p157.

people's baby farm'.²³² The fact that Mrs Cotton went on to become a surrogate again,²³³ and founded the non-profit organisation COTS in 1988,²³⁴ suggests that she did not feel exploited. Moreover, her motivations to improve her own economic circumstances coincided with her empathy for the intended parents.²³⁵ In this respect, the commercial-altruistic dichotomy fails to acknowledge that some surrogates like Kim Cotton do want to be paid, and that altruistic and self-centred motivations can co-exist. Child-bearing should not somehow become 'dishonourable when done for money'²³⁶ rather than altruism. After all, we do not 'object to paying doctors for their services in collaborative reproduction',²³⁷ so the surrogate's own services should be recognised and rewarded.

Over three decades on from the SA Act 1985, payments to surrogates remains a 'taboo' subject and critics are quick to assume the status quo in maintaining that altruistic surrogacy is the only suitable model for the UK. The *Myth Busting Report*, conducted by Surrogacy UK, ruled out payments quickly and recommended new legislation on surrogacy which 'facilitate the altruistic, compensatory nature of surrogacy in the UK while preventing commercialisation and sharp practice.'²³⁸ The Report observed that there was 'little support' amongst surrogates and intended parents for commercial surrogacy.²³⁹ However, this does not represent the view of all surrogacy organisations in the UK. Brilliant Beginnings,²⁴⁰ another non-profit surrogacy organisation,

²³² Hansard, 'Surrogacy Arrangements Bill', HC Deb 15 April 1985 vol 77 cc23-56, Mr Michael Meacher. Available at <http://hansard.millbanksystems.com/commons/1985/apr/15/surrogacy-arrangements-bill#S6CV0077P0_19850415_HOC_182>(last accessed 11/05/15).

²³³ Kim Cotton, *Second Time Around: Full Personal Story of my Second Surrogate Pregnancy*, 10 February 1992.

²³⁴ A non-profit organisation aimed at helping surrogates and intended parents using surrogacy. <https://www.surrogacy.org.uk/> (Last accessed 04/06/18).

²³⁵ Kim Cotton and Denise Winn, *Baby Cotton: For Love and Money*, 1985. (Published by Gollancz).

²³⁶ Carmel Shalev, *op cit*, n225, p159.

²³⁷ *Ibid.*

²³⁸ *The Myth Busting Report*, *op cit*, n19, p5 'Foreword'.

²³⁹ *Ibid*, p27.

²⁴⁰ Brilliant Beginnings is a sister organisation of Natalie Gamble Associates (NGA), a law firm specialising in surrogacy. NGA supports a move towards advertising and compensating surrogates

recognises that ‘the law appears to restrict payments to “reasonable expenses” but in reality the courts routinely authorise compensation’.²⁴¹ Brilliant Beginnings suggests that clarity is needed within UK law to permit ‘surrogates to be compensated for inconvenience as part of their expenses, reflecting reality and allowing this issue to be dealt with more honestly and transparently.’²⁴² Kim Cotton, founder of Childlessness Overcome Through Surrogacy and surrogate to ‘*Baby Cotton*’,²⁴³ also believes that surrogates should be paid compensation, not just ‘reasonable expenses’:

‘The 1985 Surrogacy Act is out of date. We should be able to advertise for a surrogate mother and be able to openly pay for her time, as she will give up between 12 to 18 months of her life’.²⁴⁴

Brilliant Beginnings and COTS both differ from SUK in this respect because they are open to paying surrogates compensation, rather than just ‘reasonable expenses’.

SUK’s position that paying surrogates compensation has ‘little support’ needs to be explored further, especially in light COTS and Brilliant Beginnings, which support a move towards compensatory payment. Drawing upon the preliminary findings of an Australian empirical project on cross-border reproduction, Jackson *et al.*, found that ‘the historical stigma attached to the ‘commercialisation’ of reproductive contributors is not shared by intended parents’.²⁴⁵ The authors found that:

‘For many participants, the lack of payment to the surrogate or egg donor in domestic arrangements was believed to be unfair to her, as she was then, effectively, the only

for their inconvenience. See <<https://www.nataliegambleassociates.co.uk/knowledge-centre/how-uk-surrogacy-law-needs-to-change>> (accessed 22/01/19).

²⁴¹ Brilliant Beginnings webpage, available at <<https://www.brilliantbeginnings.co.uk/campaigning/simplify-surrogacy-law>> (accessed 22/01/19).

²⁴² *Ibid.*

²⁴³ *Op cit*, n4.

²⁴⁴ IVF Babble, April 2018, ‘Britain’s first surrogate mother, Kim Cotton, calls for update of ‘antiquated’ UK surrogacy laws’, available at <<https://www.ivfbabble.com/2018/04/britains-first-surrogate-mother-kim-cotton-calls-update-antiquated-uk-surrogacy-laws/>> (accessed 22/01/19).

²⁴⁵ E Jackson *et al.*, *op cit*, n1.

volunteer surrounded by a number of professional participants—including doctors, counsellors and lawyers—all of whom were acting for profit.’²⁴⁶

This corresponds with one of the intended father’s views, Steve, who was domiciled in the UK and entered into a commercial surrogacy arrangement in California.²⁴⁷ He explained that:

‘I like the framework that [our surrogate] gets something out of it to better her life... She’s doing it to help us but also to make money and set up her own family. I don’t have an issue with that because we both know where we stand. I think domestically when people are doing it altruistically, it can be confusing for people. What are the reasons for it? I think those reasons are genuine, but culturally it throws up just as many questions as people who are doing it for money. So, I don’t see why we can’t be accommodated.’²⁴⁸

This indicates that there are some intended parents, perhaps whose voices have not been represented in the UK, that challenge the view that altruism is incompatible with paying surrogates for their help and labour. It is also questionable whether the payments Steve made to his surrogate are so different from the reasonable expenses paid by Rosie, an intended mother who entered an ‘altruistic’ arrangement in the UK. Rosie explained that reasonable expenses covered any expense the surrogate incurred because of her pregnancy. This ranged from childcare, ‘ante-natal yoga’, ‘takeaway or convenience food to feed her family’, ‘a cleaner’, ‘a gardener’, and a ‘holiday when the baby’s born so they [the family] can regroup and reconnect’.²⁴⁹ It is clear that the line between reasonable expenses and payments is becoming increasingly blurred.

It is suggested that one way forward for law reform, would be to allow a ‘moderate fee’ to be paid to surrogates, in addition to ‘reasonable expenses’. Alghrani, Griffiths and Brazier suggest that a ‘moderate fee’ could be based on the surrogate being paid minimum wage for her service.²⁵⁰ A nine-month pregnancy calculated at current

²⁴⁶ *Ibid*, p30.

²⁴⁷ Interview 04IF, recorded on 07/10/16 (on file with the author).

²⁴⁸ *Ibid*.

²⁴⁹ Interview 03IM, recorded on 11/07/16 (on file with the author).

²⁵⁰ A Alghrani, D Griffiths and M Brazier, *op cit*, n15.

minimum wage equates to a sum in the region of £40,000 – £52,000. The authors note that this sum can be justified on the basis that:

‘Pregnancy is hard work and a risky enterprise; allowing payment of a minimum wage allows for formal recognition of the valuable services surrogates provide; it is this service that is being remunerated and not the purchase of a baby.’²⁵¹

Nevertheless, the authors acknowledge that this sum exceeds the cost of surrogacy in some US states.²⁵² They suggest that an alternative is to treat surrogacy as a full-time job and pay up to a maximum of the minimum wage of £7.38 for 37.5 hours over the 40 weeks of the pregnancy.²⁵³ A further alternative would be to pay surrogates the living wage of £7.83 for 37.5 hours over 40 weeks.²⁵⁴ It is suggested that paying the surrogate a ‘moderate fee’ based on minimum or living wage is a better option than paying £40,000 - £52,000. Having such a high sum (or worse still, creating a free market where intended parents and surrogates set the fee)²⁵⁵ could price intended parents ‘out of the market, so that only those of considerable means would have this method of founding a family open to them’.²⁵⁶ Restricting payment to a ‘moderate fee’ based on minimum or living wage would also ensure that sum does not ‘overbear the will of the surrogate’, something the ‘courts retrospectively authorising payments have been’²⁵⁷ concerned about. Ultimately, a balancing act is required for policy-makers when calculating what a ‘moderate fee’ should be. Set the UK fee too high and the surrogate’s will could be overborne and / or UK couples will still resort to other jurisdictions like India, where a surrogate’s services can be obtained for less.

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ This would amount to £11,070.

²⁵⁴ This would amount to £11,745. Living Wage webpage, <<https://www.livingwage.org.uk/what-real-living-wage>> (accessed 24/01/19).

²⁵⁵ An open market in surrogacy, for the UK, is not advocated by this thesis. As Shalev warns, ‘... there is concern that a free market scheme would relegate underprivileged women to a new oppressed and undignified occupation, like prostitutes and wet nurses.’ *Op cit*, n225, p159.

²⁵⁶ A Alghrani and D Griffiths, *op cit*, n16, p183.

²⁵⁷ A Alghrani, D Griffiths and M Brazier, *op cit*, n15.

Moreover, ‘if set too low the change in the law may not produce more willing surrogates and thus commissioning individuals/couples will still look abroad.’²⁵⁸

An informed debate in the UK, involving surrogates, intended parents and non-profit organisations, would allow a discussion of some fundamental questions. We could find out whether paying a ‘moderate fee’ to surrogates in the UK, in addition to reasonable expenses associated with the pregnancy, could encourage more surrogates to offer their help.²⁵⁹ As Deckha suggests in the context of Canada’s ban on commercial surrogacy, ‘allowing Canadians to pay women for surrogacy would very likely increase the number of women willing to be surrogates in Canada and thus alleviate the current shortage.’²⁶⁰ We could also find out whether defining ‘reasonable expenses’ in more concrete terms would provide more certainty to intended parents and surrogates; whether it is the terminology of ‘payment’ and ‘commercialisation’ that organisations like the SUK and the *Myth Busting* Report do not like; whether not paying surrogates more than reasonable expenses is of itself potentially exploitative; and whether the ban on advertising is responsible for the shortage of surrogates within the UK.

Finally, there needs to be meaningful debate, involving intended parents, surrogates and professionals about whether surrogacy arrangements should be enforceable. In 1989, Carmel Shalev argued in her book *Birth Power*:

‘The paternalistic refusal to force the surrogate mother to keep her word denies the notion of female reproductive agency and reinforces the traditional perception of women as imprisoned in the subjectivity of their wombs. The benevolent protection of women from themselves places an indelible stamp of illegitimacy on the notion of a woman contracting to bear a child for another person. It implies that reproductive matters are not proper subjects for legal relations, reinforcing the public-private dichotomy that relegates women’s reproductive activity to the shadow life of a male-dominated socioeconomic political order.’²⁶¹

²⁵⁸ A Alghrani and D Griffiths, *op cit*, n16, p184.

²⁵⁹ A Alghrani, D Griffiths and M Brazier, *op cit*, n15.

²⁶⁰ M Deckha, *op cit*, n226, p64.

²⁶¹ Carmel Shalev, *op cit*, n225, p121.

Shalev suggests that the only possible reason for preventing a surrogate from making a legally binding commitment to the intended parents is her biology; ‘her state of mind at the moment of agreement is not to be taken seriously because it is subject to change during the performance of her undertaking, due to the nature of pregnancy’.²⁶² Shalev argues that ‘a woman pregnant with a child is no less deserving of special treatment than an artist pregnant with inspiration. But her special condition in no way justifies the condescension that denies her autonomy as a human being’.²⁶³ It is suggested that policy-makers need to revisit the assumptions that have been made about enforceable arrangements, advertising, and particularly payments to surrogates.

7.5 Conclusion

This chapter has explored the causes of, and problems arising from, international commercial surrogacy arrangements, particularly for the intended parents and children involved. The UK’s strict legislative regime is responsible for pushing intended parents like Liz and Steve into more surrogacy-friendly jurisdictions. The features of commercial surrogacy prohibited by the SA Act 1985 are futile given that UK intended parents can circumvent the law. The interviews with Liz, who entered a commercial surrogacy arrangement in India, and Steve, who entered a commercial arrangement in the US, revealed how intended parents can find themselves with practical and financial difficulties. The cases of *X and Y*²⁶⁴ and *Re: JJ (A Child)*,²⁶⁵ also demonstrate how uncertain the quest for parenthood is in the international surrogacy context. Conflicting laws mean UK intended parents are at the whim of the surrogate, and her spouse/partner, who must consent to the parental order, whilst the laws of their own country relieve them of any responsibility, thus leaving the child parentless and stateless. The absence of uniform Private International Law rules on legal parentage has led to ‘limping parentage across borders in a number of cases and can create

²⁶² *Ibid.*

²⁶³ *Ibid.*, p122.

²⁶⁴ *Op cit*, n7.

²⁶⁵ *Op cit*, n100.

significant problems for children and families’.²⁶⁶ As the Parentage / Surrogacy Project has noted, having no legal parent:

‘[C]an have far-reaching legal consequences for all involved: for example, it may affect the child’s nationality, immigration status, the attribution of parental responsibility regarding the child or the identity of the individual(s) under a duty to financially maintain the child, etc. Difficulties may also arise because the parties involved in such an arrangement are vulnerable and at risk.’²⁶⁷

In the long-term a ‘multilateral, legally binding instrument that would establish a global, coherent and ethical practice of international surrogacy’²⁶⁸ (like the Hague Convention on Intercountry Adoption), would help to resolve these problems. For now, it is suggested that surrogacy should be more accessible in the UK, (e.g. by allowing a ‘moderate fee’ to be paid to surrogates) which could discourage intended parents from looking to other jurisdictions for help.

Another major problem arising from international commercial surrogacy arrangements is the conflict between child welfare and public policy objections to commercialisation. Section 54(8) of the HFEA 2008 only allows ‘reasonable expenses’, however, following the Parental Order Regulations 2010 the judiciary have retrospectively authorised payment that goes far beyond reasonable expenses in international commercial surrogacy cases. This shows how the patchwork of UK regulation is internally contradictory and needs updating.

The next part of this chapter considered the implications of international commercial surrogacy arrangements for the children involved, particularly for their right to identity which is protected in Articles 7 and 8 of the CRC and Article 8 of the ECHR. The empirical work suggested that some intended parents, like Liz, may use international commercial surrogacy because they perceive there to be a shortage of egg donors in the UK and also want an anonymous donor. This corresponds with findings by Culley

²⁶⁶ Hague Conference on Private International Law, Report Of The Experts’ Group On The Parentage / Surrogacy Project (Meeting Of 25-28 September 2018), p2, para 6. Available at <<https://assets.hcch.net/docs/8525d54b-4923-466a-bb23-01f747d076fd.pdf>> (accessed 22/01/19).

²⁶⁷ Hague Conference on Private International Law, ‘The Parentage / Surrogacy Project’, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 22/01/19).

²⁶⁸ K Trimmings and P Beaumont, *op cit*, n106, p633.

*et al.*²⁶⁹ However, as Hedley J recognised in *X and Y*, the withdrawal of gamete donor confidentiality is ‘wholly justifiable ... from the child’s perspective’.²⁷⁰ Gamete donation in the UK must be increased and early parental disclosure of all aspects of the child’s conception must be actively encouraged. There should be debate as to the age at which children should be informed. International commercial surrogacy arrangements also jeopardise the child’s right to know their surrogate and have information about their gestational parents. Poor record-keeping and inaccurate details of the surrogate is a common theme in the parental order cases involving international surrogacy.²⁷¹ International commercial surrogacy also has a bearing on the child’s cultural and ethnic origins and the child may feel disconnected from this if they are removed from their country of birth.²⁷²

The final part of this chapter provided some suggestions to encourage intended parents to use surrogacy in the UK. Firstly, policy-makers, surrogates, intended parents and society must revisit concerns with exploitation and commodification. It is suggested that the assumptions made by the *Warnock Committee* about exploitation and payment have gone untested. Furthermore, the *Brazier Review* was unable to consider commercial surrogacy because it was outside its terms of reference. There needs to be a new review to consider whether advertisements should be allowed, whether contracts should be enforceable, and whether moderate payment to the surrogate would help increase the number of women who offer their help in the UK. Paying surrogates a ‘moderate fee’, in addition to reasonable expenses, would reflect that the ‘pregnancy is hard work and a risky enterprise’²⁷³ and can still be reconciled with altruistic motivations. Since commercial sums are already authorised in international cases, it is suggested that ‘moderate’ payment would be acceptable especially if surrogates and intended parents use a licensed clinic.²⁷⁴ Other reforms, including pre-birth orders for

²⁶⁹ *Op cit*, n144.

²⁷⁰ *Op cit*, n7, [26] (Hedley J).

²⁷¹ *D and L*, *op cit*, n11.

²⁷² *C Achmad*, *op cit*, n142.

²⁷³ A Alghrani, D Griffiths and M Brazier, *op cit*, n15, p16.

²⁷⁴ It was suggested in chapter 5 that non-profit organisations like COTS, SUK and BB should be licensed by the HFE Authority, or a similar body.

those using a licensed UK clinic, are also likely to encourage intended parents to use surrogacy at home since the quest to parenthood will become more certain.

Chapter Eight

8. Conclusion

Throughout this thesis, the contention has been that UK surrogacy regulation is outdated, piecemeal and not fit for purpose. The provisions in the Human Fertilisation and Embryology Acts 1990 and 2008 (HFEA's 1990, 2008) entrench the 'sexual family'¹ and overwhelmingly fail to protect the plethora of less conventional families now using surrogacy, including single parents by choice,² multiple parents, co-parents, and non-genetic parents. Restrictive legislation and the advent of the internet have spurred intended parents to enter high-risk 'do-it-yourself' (DIY) arrangements in the UK, predominantly through social media forums such as 'Facebook'.³ Other intended parents have ventured overseas in the hope of finding a simpler path to parenthood but have instead found themselves trekking through a 'thorn forest'⁴ of legal complications, which have resulted in their children being left 'marooned parentless and stateless'.⁵ The Surrogacy Arrangements Act 1985 (SA Act 1985) was introduced to placate a panicked society in the wake of *Baby Cotton*,⁶ however public attitudes towards surrogacy have changed considerably and new regulation is urgently required to reflect the societal and legal changes that have occurred over the last three decades.

As noted in chapter 2, the recent declaration of incompatibility issued in the High Court by Munby P, between the 'two-person' requirement in section 54(1) HFEA

¹ M A Fineman, *The Neutered Mother, the Sexual Family and other Twentieth Century Tragedies* (Routledge: New York and London, 1995) 143.

² *B v C (Surrogacy: Adoption)* [2015] EWFC 17; *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73, hereafter '*Re Z*'; and, *In the matter of Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), hereafter '*Z (A Child) (No 2)*'.

³ See for example *CW v NT and another* [2011] EWHC 33; *H v S (Surrogacy Agreement)* [2015] EWFC 36; and *Re Z (Surrogacy agreements) (Child arrangement orders)* [2016] EWFC 34 (hereafter '*Re Z (Surrogacy agreements)*').

⁴ *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [26] (Hedley J). Hereafter '*X & Y*'. At para [2] (Hedley J).

⁵ *Ibid*, [10] (Hedley J).

⁶ *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

2008 and the single father's right to private and family life (Article 8 European Convention on Human Rights),⁷ presented a perfect opportunity to re-examine the surrogacy landscape. This project set out to achieve this by asking the following questions:

- 1) How fit for purpose is the current patchwork of regulation currently governing surrogacy?
- 2) Does the legislation's preference towards the sexual family affect the procreative rights of the intended parents and the rights of the child?
- 3) How does the ban on commercial surrogacy affect procreative rights and the rights of the child?
- 4) How has the judiciary (both domestic and in the European Court of Human Rights) treated the rights of the child and the intended parents' procreative liberty?
- 5) Which reforms are necessary to centralise procreative liberty and children's rights in UK surrogacy legislation?

The research presented in this thesis can help policy-makers and law reformers identify the changes that are now required. The suggested reforms have been influenced by a small qualitative study, which was conducted to investigate the experiences of eight intended parents and two surrogates who had used surrogacy in the UK or overseas. Although the sample was small, the participant's experiences provided a unique, personal insight into the problems surrogates and intended parents encounter. Interestingly, some of the interviews departed from the status quo that altruistic surrogacy is the only acceptable regulatory model.⁸ This suggests that further research is needed to unpack the 'taboo' of commercialisation, particularly payments to the surrogate.

⁷ *Z (A Child) (No 2)*, *op cit*, n2.

⁸ 'Surrogacy in the UK: Myth busting and reform', *Report of the Surrogacy UK Working Group on Surrogacy Law Reform*, November 2015, p5 'Foreword'. Available at <https://kar.kent.ac.uk/59740/1/Surrogacy%20in%20the%20UK%20Report%20FINAL.pdf> (last accessed 16/09/18).

8.1 Areas of Reform

The research pointed to three key areas in which reform is necessary. The first two relate to legal parenthood and the final relates to the way surrogacy is now practised by UK intended parents.

(I) The ‘Relationship Provisions’

‘One of the central assumptions underpinning our conceptualization of family is that the entity is dependent upon a heterosexual relationship between a man and a woman. This form of affiliation, romanticized in the glorification of the nuclear family, is central to traditional family law ideology. Politicians as well as religious leaders extol this relationship (if it is sanctified) as the core of the family.’⁹

This thesis has shown that UK surrogacy regulation ‘glorifies’ the ‘nuclear family’,¹⁰ which consists of two parents and their genetically related children. As noted in chapters 2 and 3, to apply for a parental order, the intended parents must be husband and wife,¹¹ civil partners,¹² or ‘living as partners in an enduring family relationship’.¹³ This narrow approach to parenthood leaves no protection for those headed by single parents and platonic co-parents, who must make do with an adoption order,¹⁴ child arrangements order,¹⁵ or wardship,¹⁶ none of which reflect the identity of surrogacy-conceived children. In *‘Z (a child) (no 2)’*, Munby P issued a declaration of incompatibility between the two-person requirement and Articles 8 and 14 ECHR, on the basis that there is a difference in treatment between a single person entering into a lawful surrogacy arrangement, and a couple entering the same arrangement, on the

⁹ M A Fineman, ‘The Neutered Mother’, 46 *University of Miami Law Review*, 653, 670 (1992). At p663.

¹⁰ *Ibid.*

¹¹ Section 54(2)(a) HFEA 2008.

¹² Section 54(2)(b) HFEA 2008.

¹³ Section 54(2)(c) HFEA 2008. In this chapter, the requirements in section 54(2) HFEA 2008 are referred to as the ‘relationship provisions’, because they determine whether a person is eligible to apply for a parental order on the basis of their relationship status.

¹⁴ *B v C*, *op cit*, n2.

¹⁵ *Re Z*, *op cit*, n2; and *Re A (Foreign Surrogacy- Parental Responsibility)* [2016] EWFC 70.

¹⁶ See *M v F & SM (Human Fertilisation and Embryology Act 2008)* [2017] EWHC 2176 (Fam).

sole ground of the single person's relationship status.¹⁷ UK surrogacy regulation violates the human rights of single parents, including single parents *by choice* which is a distinct group of single mothers and fathers who make an active decision to parent alone.¹⁸ The HFEA 2008 should discontinue its arbitrary focus on family structure and focus instead on the 'actual contingencies of care-giving'.¹⁹ Removal of the two-parent requirement would also create much-needed parity with ARTs regulation, which allows single women to access IVF.

Another 'relationship provision' that needs to be removed from the HFEA 2008 is the 'enduring family relationship' threshold. This research exposed the implications of the provision for procreative autonomy, an issue that has gone uncriticised by academic commentators, the judiciary, and policy-makers. The provision has been interpreted in a way that requires couples to be in a sexual relationship, similar to marriage or civil partnership.²⁰ This prevents co-parents and wider kin relations (e.g. the child's mother and grandmother) from applying for a parental order, even if it is in the best interests of the child for the order to be made. Those accessing ARTs do not need to demonstrate an enduring family relationship, so removing this provision would help bring greater uniformity between surrogacy and ARTs regulation and help refocus the law away from conjugality towards caregiving.

As noted in chapter 3, the 'relationship provisions' also fail to promote and protect the rights inherent in the United Nations Convention on the Rights of the Child (CRC) and ECHR, particularly the child's rights to identity,²¹ private and family life²² and

¹⁷ [11] and [13].

¹⁸ S Golombok, S Zadeh, and S Imrie, v Smith, T Freeman, 'Single Mothers by Choice: Mother–Child Relationships and Children's Psychological Adjustment', *Journal of Family Psychology*, 2016, Vol. 30, No. 4, 409–418, p410. N Carone, R Baiocco and V Lingiardi, 'Single fathers by choice using surrogacy: why men decide to have a child as a single parent', *Human Reproduction*, Vol.32, No.9 pp. 1871–1879, 2017.

¹⁹ M Fineman, p143, *op cit* n1.

²⁰ See the judiciary's interpretation of the provision in *Re F and M (Children) (Thai Surrogacy) (Enduring Family Relationship)* [2016] EWHC 1594 (Fam); and *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam) (hereafter '*Re X*').

²¹ Articles 7 and 8 CRC.

²² Article 8 ECHR and Article 16 CRC.

non-discrimination.²³ The judiciary have persistently held that a parental order is key to shaping, recognising and respecting the child's identity as a surrogacy-conceived child. because it:

‘Goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family.’²⁴

Despite this, single parents and their children are unable to apply for a parental order. It is recalled from chapter 3 that the two-parent requirement assumes that single parenthood creates non-optimal conditions for children, including child poverty. However, single parents by choice ‘differ in a number of important ways from those who become single mothers following separation or divorce’.²⁵ For instance, children are ‘less likely to have experienced the economic hardship or maternal psychological problems that commonly result from marital breakdown and unplanned single parenthood’.²⁶ The nuances of single parenthood highlighted by this thesis call into question the government's deep-rooted belief that surrogacy-conceived children require two parents.²⁷

Given the legislative limitations with the HFEA 2008, chapter 3 used Tobin's framework,²⁸ and other indicators of a children's rights approach,²⁹ to assess the judiciary's response to the ‘relationship provisions’. It is concluded that the judgments

²³ Article 14 ECHR and Article 2 CRC.

²⁴ *Re X*, *op cit*, n20. Para [54], (Munby P).

²⁵ V Jadvā, S Badger, M Morrisette and S Golombok, ‘Mom by Choice, Single by Life's Circumstances ... Findings from a Large Scale Survey of the Experiences of Single Mothers by Choice’ (2009) 12(4) *Human Fertility* 175, p 182. (Emphasis added).

²⁶ S Golombok, S Zadeh, S Imrie, V Smith and T Freeman, *op cit*, n18, p410.

²⁷ Dawn Primarolo (MP) argued that the responsibility of surrogacy ‘is likely to be better handled by a couple than a single man or woman’. HC Debs, Human Fertilisation and Embryology Bill Committee, Col 248-249 (12 June 2008), Dawn Primarolo, <<http://www.publications.parliament.uk/pa/cm200708/cmpublic/human/080612/am/80612s02.htm>> (last accessed 02/01/17).

²⁸ J Tobin, ‘Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?’ (2009) 33 *Melbourne University Law Review* 579.

²⁹ Including the five suggested by K Hollingsworth and H Stalford, ‘Towards Children's Rights Judgments’, chapter 3, in *Rewriting Children's Rights Judgments: From Academic Vision to New Practice*, edited by H Stalford, K Hollingsworth and S Gilmore, 2017 (Hart Publishing, 1st ed).

in *Re Z* and *Re Z (No 2)*³⁰ are a missed opportunity for promoting the rights of the child. It does not utilise any of the relevant rights in the CRC, acknowledge the implications of the single parent exclusion for the enduring family relationship threshold, or capture how these relationship provisions affect the child's right to identity. The current legal regime that exists in the UK, and the judiciary's inability to 'read down' the two-person requirement and provide much-needed relief for single parent surrogacy families, means that this group is:

'Compelled to make do with legal solutions – adoption orders or child arrangements orders – which do not provide the optimum legal and psychological solution for, and thus do not promote the best interests of, a child born of a surrogacy arrangement'.³¹

It is now a matter of urgency that policy-makers remove *all* the relationship provisions from the HFEA 2008 and consider an alternative basis to assign legal parenthood.

(II) Challenging the Genetic and Gestational View of Surrogacy

The second area requiring urgent reform, relates to surrogacy regulation's marginalisation of 'social' / 'psychological' parenthood. The genetic requirement in section 54(1)(b) HFEA provides that 'the gametes of at least one of the applicants were used to bring about the creation of the embryo.' This has resulted in the non-genetic parent being marginalised where the surrogate changes her mind about the agreement,³² and where the non-genetic intended parent's relationship with the genetic intended parent breaks down.³³ Discussion of these issues in chapter 4 revealed a worrying difference in the way prospective parents using IVF and surrogacy are treated. Those seeking IVF treatment are permitted to use gamete donation whereas with surrogacy, at least one of the intended parent's gametes must have been used. This implies that a parent who does not have a gestational and genetic role (i.e.

³⁰ *Op cit*, n2.

³¹ *Re Z*, *op cit*, n2. Para [21] (Munby P).

³² *CW v NT and H & S*, *op cit*, n3

³³ *JP v LP & Others* [2014] EWHC 595 (Fam).

someone relying on double-donor surrogacy) is not a ‘real’ parent,³⁴ whereas a woman using IVF is because her ability to gestate compensates for the absence of a genetic tie. Not only is this contrary to Baroness Hale’s statement in *Re G*³⁵ that social / psychological parents can be just as important for the child as gestational and genetic parents,³⁶ but it sends out an extremely damaging message that non-genetic families are inferior; this was rejected many years ago by the ECtHR in *Marckx v. Belgium*.³⁷ It is suggested that law reformers should remove the genetic requirement to help eradicate this discrimination and create parity between surrogacy and ARTs regulation. Such a move is also supported by the *Myth Busting Report*³⁸ and some of the interviewees involved in this project, who found it:

‘Insulting to donor conceived families to assume that if you’ve not got a genetic connection you’re less of a parent to your child ... if double donation is ok for IVF then why is it not ok for surrogacy?’³⁹

A further assumption that must be addressed is the unchallenged view that doubly-infertile intended parents should ‘adopt instead’.⁴⁰ The empirical work carried out for this thesis demonstrates that the processes involved in double-donor surrogacy are radically different from adoption. For instance, Gemma, an intended mother who was single *and* had no genetic link to her child, explained that she had not missed any aspect of the pregnancy, to the extent that she felt as though she was pregnant herself.⁴¹ This type of involvement is not something adoptive parents can do with their adopted children, thus making a parental order rather than an adoption order more appropriate for double-donor surrogacy families. Furthermore, with double-donor surrogacy the

³⁴ This was implied in the South Africa Constitutional Court’s decision in *AB and Another v Minister of Social Development* [2016] ZACC 43. Hereafter ‘*AB and Another (CC)*’. Footnote [273] of the Constitutional Court’s majority decision.

³⁵ *Re G* [2006] UKHL 43.

³⁶ Paras [33]-[36] (Baroness Hale).

³⁷ 13 June 1979, [31], Series A no. 31.

³⁸ Myth-Busting Report, *op cit*, n8.

³⁹ Interview 07IM, recorded on 15/07/16 (on file with the author).

⁴⁰ Elizabeth Bartholet, *Family Bonds: Adoption, Infertility, and the New World of Child Production* (Houghton Mifflin 1999). p 226. See also, D Friedrich, ‘A Duty to Adopt?’ *Journal of Applied Philosophy*, Vol. 30, No. 1, 2013, which makes the case for a general duty to adopt.

⁴¹ Interview 06IM, recorded on 11/07/17 (on file with the author).

intended parents and surrogate can remain in each other's lives after the child is born. As such, 'there are important psychological differences between becoming a parent through adoption, and having a child through surrogacy'.⁴²

As noted in chapter 5, the genetic requirement also sits uneasily with the best interests and welfare of surrogacy-conceived children. It makes a dangerous presumption that children require biological parents, which is contrary to *J and Another v C and Others*⁴³ where it was held that there would be no presumption in favour of biological parents in disputes between them and long-term foster carers. Discussion of *CW v NT and another*⁴⁴ and *H & S*,⁴⁵ highlighted that it is the child who loses out when their social (non-genetic) intended parent is marginalised. Therefore, it is one of the main contentions of this thesis, that it would be in the best interests of the child, and fairer for the adults involved, for legal parenthood to be assigned to those who *intend* to raise the child (i.e. the intended parents). As Horsey states, 'the genetic and gestational contributors to the child ... undoubtedly possess compelling claims to parenthood'⁴⁶ but 'these claims are not as strong or as accurately reflect the social situation that will be in place as those of the intending parents'.⁴⁷ Consequently, section 33 HFEA 2008, which assigns legal motherhood to the surrogate and 'no other woman' would need to be removed. The provision fails to reflect that most surrogates do not want to be recognised as the legal parent of the child.⁴⁸ It is suggested that a presumption of legal parenthood should be created in favour of the intended parents. The parental order could be pre-authorised by the High Court so that legal parenthood is conferred on the intended parents at birth, a view shared by the 2017 *Myth Busting Report*⁴⁹ and some

⁴²*AB and Another (CC)*, *op cit* n34. Para [180] Khampepe J (Cameron J, Froneman J and Madlanga J concurring).

⁴³ [1969] 1 All ER 788.

⁴⁴*Op cit*, n3.

⁴⁵ *Ibid.*

⁴⁶K Horsey, 'Challenging presumptions: legal parenthood and surrogacy arrangements', 22 *Child and Family Law Quarterly*, 449 2010. P456.

⁴⁷ *Ibid.*

⁴⁸ S Imrie and V Jadva, 'The long-term experiences of surrogates: relationships and contact with surrogacy families in genetic and gestational surrogacy arrangements', *Reproductive BioMedicine Online* (2014) 29, 424–435. P425.

⁴⁹ *Op cit*, n8, p6.

of the intended parents interviewed for this project. This presumption could be rebuttable, (and the parental order revoked after the child's birth) where the court decides it is not in the best interests of the child to be raised by the intended parents.⁵⁰ Recognising multiple legal parents could also be an option where the parties *all intend* to be child's social parents.⁵¹

Intention-based parenthood is one of the most important reforms advocated by this thesis, and it is suggested that this alternative basis for assigning legal parenthood should only exist for surrogacy (and potentially other ARTs). If this reform is implemented, legal parenthood would be assigned to the intended parent(s) irrespective of whether they have a genetic link with the child. This thesis addressed the concern that removing the genetic requirement and section 33 HFEA 2008 could create a risk that surrogacy-conceived children will not learn of their genetic and / or gestational origins. Measures to encourage early parental disclosure can be developed including Crawshaw *et al's.*, suggestion that birth certificates should record the genetic 'parents', birth/gestational 'parent'⁵² and those raising the child (i.e. the intended parents); it could be made clear that only the child's intended parents are the legal parents.

(III) Discouraging DIY and International Commercial Surrogacy?

'The path to parenthood has been less a journey along a primrose path, more a trek through a thorn forest.'⁵³

The third area of reform relates to the way surrogacy is now practised by UK intended parents. In chapter 6, DIY arrangements were compared with more formal arrangements facilitated by non-profit organisations including Childlessness Overcome Through Surrogacy (COTS), Surrogacy UK (SUK) and Brilliant

⁵⁰ For example, where the surrogate is better able to promote the child's welfare and best interests, or where the intended parents (or one intended parent) change their mind about the surrogacy.

⁵¹ As was the case in *A.A. v. B.B.*, (2007) 83 O.R. (3d) 561 (C.A.) [*A.A. v. B.B.*].

⁵² *Ibid.*

⁵³ *X & Y, op cit*, n4.

Beginnings (BB). The main conclusion reached was that DIY arrangements create greater risks for those involved. The case of *‘Re Z (Surrogacy agreements)’*⁵⁴ exposed how UK surrogates are at risk of exploitation in DIY arrangements due to the absence of professional support or screening. An application of Wertheimer’s⁵⁵ theoretical accounts of exploitation identified the exploitative aspects of DIY arrangements, including risks to the surrogate’s health and future ability to procreate. Intended parents are also at risk of exploitation due to the ‘dangerous and murky waters’ of the internet.⁵⁶

New regulation is now required to encourage parties to enter more formal arrangements with COTS, SUK and BB, where the parties are given the chance to communicate their expectations of each other, have professional support and have a period of getting to know one another. As noted in chapter 6, The Human Fertilisation and Embryology Authority (HFE Authority) should have a role in licensing and regulating non-profit surrogacy organisations. This would add a layer of protection for those using these non-profit organisations by helping to improve standards. It is recalled that while organisations like COTS are better than DIY arrangements, they rely on the help of ‘well motivated volunteers’.⁵⁷ In *Re G (Surrogacy: Foreign Domicile)*,⁵⁸ COTS administered incorrect legal advice which resulted in the intended parents being unable to apply for a parental order.⁵⁹ Part of the conditions for a licence could be to ensure volunteers and others working in the non-profit organisation are familiar with the basic requirements in the HFEA 2008, the SA Act 1985, the Parental Order Regulations 2010, and any new surrogacy legislation that is enacted.

It was acknowledged in chapter 6 that this new system of regulation would depend upon surrogates and intended parents choosing to use a non-profit organisation, rather than the DIY route. It is suggested that the benefits of using a licensed surrogacy

⁵⁴ *Op cit*, n3.

⁵⁵ A Wertheimer, ‘Two Questions About Surrogacy and Exploitation’, *Philosophy & Public Affairs*, Vol. 21, No. 3 (Summer, 1992), pp. 211-239.

⁵⁶ *CW v NT*, *op cit*, n3. Para [29], (Baker J).

⁵⁷ *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam).

⁵⁸ *Ibid*.

⁵⁹ *Ibid*, [3] (McFarlane J).

agency could be explained by the HFE Authority, through advertising campaigns. Furthermore, authorisation of the parental order application before the child is born could be offered to those who use a licensed organisation. If surrogates are to be paid a moderate fee, an argument made in chapter 7, then this could be offered to surrogates who enter a surrogacy arrangement using a licensed non-profit organisation like COTS, SUK and BB. It is hoped that these incentives will help to discourage parties from the ‘dangerous and murky waters’⁶⁰ of the internet and unregulated DIY arrangements.

As noted in chapter 7, the restrictive features of UK regulation, including the ban on payments (other than reasonable expenses),⁶¹ the unenforceability of contracts,⁶² and the ban on advertisements,⁶³ have led to a shortage of UK surrogates.⁶⁴ UK intended parents, like Liz and Steve, who enter international commercial surrogacy arrangements face practical and legal difficulties.⁶⁵ International commercial surrogacy arrangements have also made it difficult for the judiciary to preserve the prohibitive stance of the SA Act 1985. The Act maintains that commercial surrogacy is illegal, yet the courts are likely to authorise commercial payments because failure to do so would leave the child without a parental order. As Hedley J stated in *Re L*,⁶⁶ ‘it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations supports its making.’⁶⁷ The rationale for banning commercial surrogacy was to protect women from exploitation yet regulation has simply outsourced this problem to jurisdictions where women have less rights and more to lose.⁶⁸ Moreover, the judgment in *Re Z*

⁶⁰ *CW v NT*, *op cit*, n3. Para [29], (Baker J).

⁶¹ Section 2 SA Act 1985 and section 54(8) HFEA 2008.

⁶² Section 1A SA Act 1985.

⁶³ Section 3 SA Act 1985.

⁶⁴ ‘Childless UK Couples Forced Abroad to Find Surrogates’, The Guardian, 20th February 2016, <<https://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogates>> (last accessed 16/09/18).

⁶⁵ *X v Y*, *op cit*, n4, [10] (Hedley J).

⁶⁶ *Re L (Commercial Surrogacy)* [2010] EWHC 3146 (Fam).

⁶⁷ *Ibid*, [10] (Hedley J).

⁶⁸ C Fenton-Glynn, ‘Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements’, *Medical Law Review*, Vol. 24, No. 1, 2016, pp. 59–75.

(*Surrogacy agreements*)⁶⁹ indicates that those entering altruistic arrangements are also susceptible to exploitation

It is one of the main conclusions of this thesis, that international commercial surrogacy is not conducive to promoting and protecting the rights of the child, particularly their right to identity.⁷⁰ As Achmad notes, international commercial surrogacy arrangements create risks for the child's genetic and biological identity, personal narrative and cultural identity.⁷¹ Reproductive travel allows intended parents to circumvent UK rules on gamete donor anonymity and use gametes from jurisdictions where anonymity is still protected.⁷² Those reforming surrogacy must look to the law regulating gamete donation in the UK which was influenced by seminal decisions like *R (on the application of Rose and another)*⁷³ and *Gaskin*.⁷⁴ In the latter, the ECtHR held that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings...'.⁷⁵ Circumvention of UK rules on donor anonymity violates the child's right to 'establish details of their identity as individual human beings'.⁷⁶ Chapter 7 also showed how international commercial surrogacy jeopardises the child's right to know their surrogate. Although the surrogate should not be assigned legal parenthood, she has helped to shape the child's personal narrative and the child should have details about their gestational 'parent'. There is a risk in international arrangements that the surrogate's identity will not be recorded

⁶⁹ *Op cit*, n3.

⁷⁰ Inherent in Articles 7 and 8 CRC and Article 8 ECHR.

⁷¹ C Achmad, 'Answering the 'Who am I' Question', chapter 8 in *Children's Rights in International Commercial Surrogacy: Exploring the Challenges from a Child's Rights, Public International Human Rights Law Perspective*, (2018), p204.

⁷² Interview 05IM, recorded on 27.08.16 (on file with the author) (Liz); and Interview 04IF, recorded on 07/10/16 (on file with the author) (Steve).

⁷³ *R (on the application of Rose and another) v Secretary of State for Health and another* [2002] EWHC 1593 (Administrative Court).

⁷⁴ *Gaskin v. United Kingdom* (Access to Personal Files), 7 July 1989, 12 EHRR.

⁷⁵ [39].

⁷⁶ *Ibid*.

accurately or made available to the child,⁷⁷ which leaves children without an important piece of their identity ‘jigsaw’.

To avoid the problems that arise from international surrogacy, for both reproductive autonomy and children’s rights, intended parents should be actively encouraged to use surrogacy in the UK. To create a more surrogacy-friendly regime, policy-makers are urged to revisit the concerns with commercial surrogacy expressed by *Warnock*,⁷⁸ *Brazier*,⁷⁹ and the judiciary in *Baby Cotton*.⁸⁰ Although an open market in surrogacy is rejected,⁸¹ paying surrogates a ‘moderate fee’ based on minimum or living wage would acknowledge the surrogate’s hard work and could encourage more surrogates to offer their help.⁸² A ‘moderate fee’, rather than substantial commercial payment, would also help to ensure that the ‘friendship first’ ethos that some intended parents find appealing about ‘altruistic’ surrogacy is not undermined.⁸³ Although the recent *Myth Busting Report* was quick to conclude that there was ‘little support’ amongst surrogates and intended parents for commercial surrogacy,⁸⁴ this is not representative of all surrogates, intended parents and surrogacy organisations,⁸⁵ who recognise that altruistic and commercial motivations can co-exist. Therefore, the issue of payments needs to be revisited by policy-makers and those involved with surrogacy in the UK.

⁷⁷ *In The Matter Of D And L (Minors) (Surrogacy) And In The Matter Of Human Fertilisation And Embryology Act 2008* [2012] EWHC 2631 (Fam).

⁷⁸ M Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Cmnd 9314 (1984). Hereafter, ‘*The Warnock Report*’.

⁷⁹ Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, Cm 4068 (1998). Hereafter ‘*The Brazier Review*’.

⁸⁰ *Op cit*, n6.

⁸¹ Allowing the intended parents and surrogate to set the price, could price some intended parents out of the market and lead to a situation where the surrogate’s will is overborne.

⁸² A Alghrani, D Griffiths and M Brazier “Surrogacy Law: From Piecemeal Tweaks to Sustained Review and Reform” in Alison Diduck, Noam Peleg and Helen Reece, (eds) *Law In Society: Reflections on Children, Family, Culture and Philosophy- Essays in Honour of Michael Freeman* (2014, Brill Publishers) pp425-453. P16.

⁸³ Interview 07IM, recorded on 15/07/16 (on file with the author) (interview with Lauren, an intended mother who had twins using the help of SUK).

⁸⁴ *Op cit*, n8, p27.

⁸⁵ See E Jackson, J Millbank, I Karpin and A Stuhmcke, ‘Learning from Cross-Border Reproduction’ *Medical Law Review*, Vol. 25, No. 1, pp23–46. Brilliant Beginnings and COTS also support a move towards compensatory payment.

8.2 Future Implications of the Research

From the above discussion, seven main legal reforms have been identified:

- (1) Removal of the relationship provisions from section 54 HFEA 2008.
- (2) Removal of the genetic requirement from section 54 HFEA 2008.
- (3) Removal of section 33 HFEA 2008, so that the surrogate is no longer assigned legal motherhood.⁸⁶
- (4) The Human Fertilisation and Embryology Authority (or similar body) should regulate and license non-profit surrogacy organisations.
- (5) The judiciary should pre-authorise parental orders where a licensed surrogacy organisation is used by the intended parents and surrogate in the UK.
- (6) A rebuttable presumption of legal parenthood should be created in favour of the intended parents.
- (7) Moderate payments to surrogates (who enter a surrogacy arrangement using a licensed non-profit surrogacy organisation) should be considered.

A new Act regulating surrogacy should be enacted to incorporate these extensive legal reforms. This would also create the opportunity to make surrogacy regulation more child-centred. The Act could incorporate the central message of the Parental Order Regulations 2010 – that the court’s paramount concern when considering parental order applications is the child’s best interests – into statutory form. New legislation could also include a checklist that is tailored to the best interests and rights of surrogacy-conceived children. The checklist could include reference to the child’s right to identity,⁸⁷ private and family life⁸⁸ and non-discrimination,⁸⁹ thereby ‘drawing on and utilising to maximum effect the formal legal tools which give effect to children’s rights’.⁹⁰ The legislation could also include explanatory guidance which emphasises the importance of informing the child about their genetic and gestational

⁸⁶ This will also affect the fatherhood and second parent provisions.

⁸⁷ Articles 7 and 8 CRC; Article 8 ECHR.

⁸⁸ Article 8 ECHR.

⁸⁹ Article 2 CRC; Article 14 ECHR.

⁹⁰ H Stalford and K Hollingsworth, *op cit*, n29.

origins. This would feed into the broader landscape of encouraging early parental disclosure to children who are born as a result of ARTs.

The above reforms would also better protect the procreative liberty of the intended parents and surrogate by assigning legal parenthood to those who intend to raise the child. Authorising the parental order before the child is born could encourage more intended parents to apply for a parental order. Currently, there is no obligation for intended parents to apply for a parental order following surrogacy and it is unknown how many children are in fact living with intended parents who have no legal parenthood for them. This is a particular risk for children born as a result of informal DIY arrangements. If the barriers to making a parental order application are minimised, and the six-month time limit,⁹¹ relationship provisions and genetic requirement are removed, more intended parents will be inclined to apply for a parental order. Overall, this thesis has shown that surrogacy operates in a completely different landscape to the one that existed at the time of *The Warnock Report*,⁹² *Brazier Review*⁹³ and the HFEA 1990. The Law Commission is currently reviewing the law on surrogacy,⁹⁴ which gives it an opportunity to develop the reforms outlined in this thesis and create a new Surrogacy Act which promotes:

‘[T]wo cardinal principles of twenty-first century family law: that there should be no discrimination against the increasingly different kinds of family which society is creating; and that the child's welfare remains the ... paramount consideration.’⁹⁵

⁹¹ Section 54(3) HFEA 2008.

⁹² *Op cit*, n78.

⁹³ *Op cit*, n79.

⁹⁴ <https://www.lawcom.gov.uk/surrogacy/> (last accessed 01/07/18).

⁹⁵ *Re Z*, *op cit*, n2. Para [20].

Appendix One

EVIDENCE OF ETHICAL APPROVAL

Mon 08/02/2016, 09:10

Walmsley, Emma;

Alghrani, Amel

Dear Amel and Emma,

I am pleased to inform you that your study has been approved. Details and conditions of the approval can be found below.

Ethics reference number: RETH001002

Committee name: Research Ethics Subcommittee for Non-Invasive Procedures

Review type: Full committee review

Title of study: A socio-legal analysis of UK surrogacy laws: Searching for a new model of regulation that protects the rights of surrogate mothers, commissioning parents and their children.

Principal Investigator: Dr Amel Alghrani and Professor Helen Stalford

Student Investigator: Miss Emma Walmsley

School/Institute: School of Law and Social Justice

First reviewer: Professor Arto Kiviniemi

Approval date: 08/02/16

The application was APPROVED subject to the following conditions:

Conditions

All serious adverse events must be reported to the Subcommittee within 24 hours of their occurrence, via the Research Integrity and Governance Officer (ethics@liv.ac.uk).

This approval applies for the duration of the research. If it is proposed to extend the duration of the study as specified in the application form, the Subcommittee should be notified. If it is proposed to make an amendment to the research, you should notify the Committee by following the Notice of Amendment procedure. If the named PI / Supervisor leaves the employment of the University during the course of this approval, the approval will lapse. Therefore please contact the Research Integrity and Governance Officer at ethics@liverpool.ac.uk in order to notify them of a change in PI / Supervisor.

Appendix Two

PARTICIPANT CONSENT FORM



PARTICIPANT CONSENT FORM

Title of Research Project:

‘A Socio-legal analysis of UK surrogacy laws: Searching for a new model of regulation that protects the rights of surrogate mothers, commissioning parents and their children’.

Participant(s):

**Please
initial
box**

1. I confirm that I have read and have understood the information sheet dated July 2016 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.
2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason, without my rights being affected. In addition, should I not wish to answer any particular question or questions, I am free to decline.

3. I agree for the data collected from me to be used in this research and future publications and that my name and any identifying details will be anonymised.

☐

4. I understand and agree that once I submit my data it will become anonymised and that I will only be able to withdraw my data up to three weeks after the interview.

☐

5. As a professional, I request that my personal details are removed when the data is used.

I agree to take part in the above study:

☐

Participant Name

Date

Signature

Name of Person taking consent

Date

Signature

Researcher

Date

Signature

Principal Investigator and student researcher:

Name Miss Emma Walmsley

Work Address School of Law and Social Justice, University of Liverpool, Room 172, Mulberry Court, Mulberry Street, L7 7EZ

Work Email hsewalms@liv.ac.uk

Version 2.1

July 2016

Appendix Three

PARTICIPANT INFORMATION SHEET



Participant Information Sheet: Intended Parents and Surrogates

My name is Emma Walmsley and I am conducting this research as a PhD student in the School of Law and Social Justice at the University of Liverpool, Liverpool, United Kingdom. You are being invited to participate in a research study. Before you decide whether to participate, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and feel free to ask me if you would like more information or if there is anything that you do not understand. Please also feel free to discuss this with your friends, relatives and GP if you wish. I would like to stress that you do not have to accept this invitation and should only agree to take part if you want to.

Thank you for reading this.

Title of the Research

“A socio-legal analysis of UK surrogacy laws and the experiences of surrogates, intended parents and practitioners: Searching for a new model of regulation that protects the rights of surrogates, intended parents and children”.

Purpose of the Research

The laws regulating surrogacy in the UK are outdated and problematic. My PhD aims to examine how surrogacy laws should be reformed in the UK. Your experiences as an intended parent or surrogate will be used to inform an alternative model of regulation that will be developed by my PhD.

Why have I been chosen to take part?

You have been chosen to take part in this research because your views as an intended parent or surrogate means you have unique experiences in this area. My PhD project aims to illuminate the urgent need for law reform in this area to ensure the rights of surrogates, intended parents and their children are recognised in the future. Your insights can help inform a draft model of regulation that my PhD will develop. Other intended parents and surrogates have been chosen to take part in this research because they too are best placed to inform any legal reforms. Your participation is voluntary and you are free to withdraw at any time without explanation and without incurring a disadvantage.

What will happen if I take part?

If you decide to take part you will be interviewed by the student researcher (Emma Walmsley). You can choose how you would like the interview to be conducted (i.e. Skype, face-to-face, telephone or email). The interviewer will send you some guidance before the interview takes place setting out the topics that will be discussed. This will give you some time to think about the issues. The duration of the interview will vary

depending upon how long you want to discuss your experiences. You will be asked a mixture of open and closed questions. The open questions are designed to encourage you to talk about your experiences of surrogacy and your opinions about why and how the law should change in this area.

You will be asked to send any relevant documents to the researcher before the interview. These documents include legal correspondence, notes about your experiences/feelings or any other documents you might think are relevant to the interview. Please note that you do not have to send anything to the researcher.

The interview will be audio-recorded. This is because the researcher can accurately transcribe the interview afterwards. If you are unhappy with anything being audio-recorded, you can request that the interviewer turn off the recording.

Are there any risks in taking part?

Some of the questions asked may cause emotional distress. As an intended parent, you may need to recount certain events in your life such as infertility problems, searching for a surrogate, having a child through surrogacy and all of the emotional and legal difficulties that accompanied those events.

As a surrogate, you may be asked to recount your motivations for helping the intended parents, your experiences of the surrogacy and your feelings after handing the child to the intended parents.

In order to minimise any potential emotional risk and harm you will be advised throughout the process that you can ask to move on to the next question or stop the interview at any time. The researcher will offer to stop audio recording the interview if you become distressed. You will be given details of support services in this information sheet, in case you need some support after the interview.

Are there any benefits in taking part?

The research will give you the chance to talk about your experiences as an intended parent or surrogate. You are central to this research. Without your perspective it would not be possible to find an alternative model of legal regulation. Your experiences will illuminate an important socio-legal issue and will add an important voice to the calls for reform.

What if I am unhappy or if there is a problem?

If you are unhappy, or if there is a problem, please feel free to let the researcher know by contacting Emma Walmsley (hsewalms@liv.ac.uk) and she will try to help. Alternatively, you can contact the student's supervisor Dr Amel Alghrani at A.Alghrani@liverpool.ac.uk.

If you remain unhappy or have a complaint which you feel you cannot come to us with then you should contact the Research Governance Officer at ethics@liv.ac.uk. When contacting the Research Governance Officer, please provide details of the name or description of the study (so that it can be identified), the researcher(s) involved, and the details of the complaint you wish to make.

Will my participation be kept confidential?

The interview will be audio-recorded. This recording will be used by the interviewer to write up the interview. The typed version of your interview will be made anonymous by removing any identifying information including your name. Anonymised direct quotations from your interview may be used in the reports or publications from the study, so your name will not be attached to them. All your personal data will be confidential and will be kept separately from your interview responses. All data will be stored securely using the University of Liverpool's data servers. Only the interviewer and her two supervisors will have access to the data. The data will be stored for at least 10 years, which is recommended by the University of Liverpool's 'Policy on Research Data Management' (Principle 3.4). After that point, the data will be destroyed.

What will happen to the results of the study?

The results will be summarised and reported in a thesis and may be submitted for publication in an academic or professional journal. All participants will remain anonymous and will also be sent a copy of the report.

What will happen if I want to stop taking part?

You can withdraw at any time, without explanation. After the interview, you will have 3 weeks to withdraw your consent to your interview being used. After this time, the researcher will have begun analysing the findings so it will be impossible to remove your interview responses.

Who can I contact if I have further questions?

You can contact the student researcher, Emma Walmsley, in the following ways:

Email: hsewalms@liv.ac.uk

Telephone: Can be requested

Support services:

Should you feel distressed either as a result of taking part, or in the future, the following resources may be of assistance. A link to the service's webpage is provided alongside a brief explanation of what the service provides.

- Brilliant Beginnings: <http://www.brilliantbeginnings.co.uk/>
Provides support and guidance for intended parents and surrogates.
- British Infertility Counselling Association: <http://bica.net/>

Professional association for infertility counsellors and counselling in the UK, which seeks to promote the highest standard of counselling for those considering or undergoing fertility investigations and treatment.

- Childlessness Overcome Through Surrogacy (COTS):
<http://www.surrogacy.org.uk/>
Provides help to surrogates and intended parents, to understand the implications of surrogacy.
- Infertility Network UK: <http://www.infertilitynetworkuk.com/>
INUK is a national infertility charity, dedicated to the support of everyone affected by infertility.
- Stonewall: <http://www.stonewall.org.uk/>
Stonewall is the national lesbian, gay and bisexual rights charity.
- Surrogacy UK: <http://www.surrogacyuk.org/>
SUK are run by volunteers who can help and support you during the stages of surrogacy. Their website hosts an online message-board and online community for friendship, advice and support.
- NHS Counselling information:
<http://www.nhs.uk/conditions/counselling/Pages/Introduction.aspx>

Version 3.0 June 2016- **Interviews**

Emma Walmsley

Appendix Four

SAMPLE OF INTERVIEW QUESTIONS

SAMPLE OF INTERVIEW QUESTIONS

Intended Parents

1. What are your reasons for using surrogacy?
2. How did you find your surrogate?
3. Did you use an agency like COTS?
4. What were your experiences when you met the surrogate?
5. Did you make an informal arrangement with the surrogate? (E.g. what would happen if the surrogate wanted to abort the foetus/ present at the scans etc).
6. Did any tensions arise in relation to what you agreed?
7. How did you feel during the pregnancy?
8. How did you feel when your child was born?

The parental order process

9. Did you pay the surrogate reasonable expenses?
10. Do you mind asking me what the reasonable expenses covered?
11. How did you feel about the agreement being unenforceable?
12. How did you find out that you needed to apply for a parental order?

Parentage

13. How do you feel about the current rules that make the surrogate the legal mother of the child?
14. Would you like to see IPs being given parenthood sooner (i.e. when the child is born)?

Overseas surrogacy

15. What were your main reasons for using surrogacy overseas?

16. What difficulties did you encounter?

General

17. Particularly good experiences.

18. Particularly bad experiences.

19. Opinions and views about how the law should work and what reforms need to take place.

20. Advertising

21. Shortage

22. IVF

Surrogates

1. Would you mind telling me your reasons for deciding to become a surrogate?

2. Did you use an agency like COTS?

3. What were your experiences when you met the IPs?

4. Did you make an informal arrangement?

5. Did any tensions arise in relation to what you agreed?

6. How did you feel during the pregnancy?

7. How did you feel when the child was born?

The parental order process

8. Were you paid reasonable expenses?

9. Do you mind asking me what the reasonable expenses covered?

10. How did you feel about the agreement being unenforceable?

11. parental order?

Parentage

12. How do you feel about the current rules that make the surrogate the legal mother of the child?

13. Would you like to see IPs being given parenthood sooner (i.e. when the child is born)?

General

14. Particularly good experiences.
15. Particularly bad experiences.
16. Opinions and views about how the law should work and what reforms need to take place.

Appendix Five

PSEUDONYMS AND INTERVIEW CODES

Pseudonym	Who was interviewed?	Code & Date of Interview
Intended Mother - Bea Husband -Jack Surrogate- Pippa	Bea (Intended mother).	01IM 15/07/16
Intended Mother - Sophie Husband - Will Surrogate- Ellen	Sophie (Intended mother).	02IM 09/07/16
Intended Mother - Rosie Husband - Gareth Surrogate – Penny	Rosie (Intended mother).	03IM 11/07/16
Intended father - Steve Partner – Robert Surrogate – Anna	Steve (Intended father).	04IF 07/10/16
Intended Mother - Liz Husband – Dan	Liz (Intended mother).	05IM 26/08/16

Two anonymous Indian surrogates		
Intended Mother - Gemma Surrogate- Sinead	Gemma (Intended mother).	06IM 11/07/16
Intended mother - Lauren Husband- Zak Surrogate- Molly	Lauren (Intended mother and lawyer).	07IM 15/07/16
Intended mother- Sally Husband - David Surrogate- Mary (O2SM)	Sally (Intended mother).	08IM 08/07/16
Surrogate- Kate	Kate (Surrogate).	01SM 07/07/16
Surrogate- Mary	Mary (surrogate for her daughter Sally)	02SM 10/07/16

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